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DEPARTMENT OF STATE

AIRGRAM

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FROM : AmEmbassy TOKYO

SUBJECT : Consular Convention with Japan

REF : Department's W-279 of January 18, 1962 and W-384 of March 27, 1962; Embassy's D-185 of August 28, 1961 and D-284 of September 25, 1961.

The second series of resumed negotiations between the Embassy and the Ministry of Foreign Affairs on the pending United States-Japan Consular Convention began on February 19, 1962 and ended on April 27, 1962. Eight meetings (numbers 7 through 14) were held during this period and Draft Memoranda of Conversation covering each meeting are transmitted herewith as Enclosure No. 1. The substantive content of these memoranda is submitted in topical format in Enclosure No. 2. Enclosure No. 3 provides a copy of a Memorandum of Conversation between the Embassy and the Foreign Ministry pertaining to the service of legal process in the United States by Japanese consular officers (see also the second paragraph of Section II-8 below).

The following discussion encompasses, in the order named, (I) a summary statement regarding the present stage of the negotiations pertaining to the proposed Consular Convention, (II) those matters on which full agreement is yet to be reached, (III) the incorporation of the Agreed

Enclosures:

1. Draft Memoranda of Conversation.
2. Substantive content of memoranda, arranged topically.
3. Memorandum of Conversation, March 10, 1962.

Reply to Tokyo
LEGAL ADVISER
drafted 7/19/62
File L/A

AUG 3 1962

DEPARTMENT OF STATE

FORM DS-323 4-62

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Drafted by: CON: HMHolland/RJBlake:jmp

Contents and Classification Approved by: CON: RJBlake

Clearances:

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the Agreed Official Minutes (AOMs) into the text of the Convention proper, and (IV) a comprehensive resume of all numbered Articles and Protocols reflecting the current areas of agreement and disagreement between the United States and Japan in respect of the entire Convention. The comparative texts referred to in Section IV below are those to be found in the columnar presentation previously submitted to the Department by Enclosure No. 4 to the Embassy's D-185 of August 28, 1961, as amended by the enclosure to the Embassy's D-284 of September 25, 1961.

I. Summary

The Embassy has presented the proposals contained in the Department's W-279 and W-384 and the Japanese responses thereto have been received. Further substantial progress has been made in narrowing the area of disagreement between the two sides and the point has now been reached where the only major problem still unresolved is the Japanese proposal in Protocol 2 that the Consular Convention ostensibly recognize the right of Japanese consular officers to represent Ryukyuans in the United States. The amended text of Protocol 2 now proposed by the Japanese side may also be construed, however, to cover Japanese nationals from all Pacific territories under United States control that are referred to in Peace Treaty Article 3.

II. Remaining Areas of Difference

1. Article 3(1) which deals with most-favored-nation treatment in the establishment of consular offices is the subject of a further proposal by Japan. While Japan has agreed to the elimination of the most-favored-nation principle, it desires an amendment, as underscored below, to the second sentence of Article 3(1) in order to clarify the meaning. Article 3(1) would then read:

> "The sending state may establish and maintain consular offices in the territories of the receiving state at any place where the receiving state agrees to the establishment thereof. The sending state may in its discretion designate a consular office as a consulate general, consulate, their branch offices, vice consulate, consular agency, honorary consulate general, or honorary consulate."

2. Article 8(3) which deals with the archives of a consular office is the subject of a further proposal by Japan, although it has now withdrawn its

earlier

earlier proposal for a word change in subparagraph 3(a). The Japanese side desires that subparagraph 3(a) become 3(b), and vice versa, in order to avoid the interpretation that the term archives might refer to archives which are not those of a consular office. Japan further proposes that the term "such officer" in the present Article 8(3)(b) be replaced by "consular officers and employees" for purposes of clarity.

3. Article 9(4) which deals with compensation for seized property is presently the subject of a counterproposal which the Japanese side formalized at the 11th meeting on April 10, 1962, following earlier discussion of the same point at the 8th meeting on February 26, 1962. Japan has proposed that the United States draft text of this paragraph as found in the left hand column in Enclosure No. 4 to the Embassy's D-185 of August 28, 1961, hereafter referred to only as "the comparative texts", be changed by substituting the following wording for the second sentence:

> "Compensation shall be payable in a form readily convertible into the currency of and transferable to the sending state, not later than three months from the date on which the amount of compensation has been finally fixed."

A discussion of this proposal will be found in the first and second enclosures to this airgram.

4. Article 11(1) which involves the jurisdiction of courts of the receiving state over employees of a consular office of the sending state who are nationals of the receiving state is the subject of alternative proposals by Japan. The first proposal is that without altering the wording of subparagraph 11(1)(a) as previously suggested by Japan, the following new sentence be added to the proposed Japanese text of the same subparagraph:

> "However, it is the common intention of the High Contracting Parties that the administrative authorities of the receiving state should not institute prosecutions against a consular employee who is a national of the receiving state in respect of such acts unless they are committed through willful misconduct or gross negligence."

Alternatively, Japan proposes that the following new sentence be added after the United States draft of this subparagraph:

"However,

"However, the courts of the receiving state shall not be precluded from exercising jurisdiction over a consular employee who is a national of the receiving state in respect of crimes committed through willful misconduct or gross negligence."

Japan's explanation for this desired change will be found in the first two enclosures to this communication.

Japan has agreed to the deletion of the words "in virtue of the provisions of the preceding paragraphs" found in the "new paragraph" between the present paragraphs 2 and 3 of Article 11.

5. Agreed Official Minute to Article 13(2)(a) which involves tax exemptions with respect to vehicles is the subject of a new proposal by Japan. It is proposed that this AOM be incorporated into the text of Article 13(2) by adding the following sentence between the first and second sentences of Article 13(2)(a):

"The number of vehicles entitled to such exemption shall be decided in accordance with the laws and regulations of the receiving state, provided that such consular officer or employee shall be entitled to the exemption with respect to at least one vehicle."

A discussion of this proposal will be found in the first two enclosures to this airgram.

6. Article 14(2) which involves the definition of the members of a consular officer's household who might be accorded privileges and immunities continues to be in dispute. The Department's views were presented to the Japanese side and Japan responded that the wording of this paragraph should conform to the phraseology used in the Vienna Conference Report on Diplomatic Intercourse and Immunities and that it would therefore prefer the wording in the right hand column of the comparative texts. A fuller explanation of the Japanese position will be found in enclosures one and two.

7. Article 16(1) which deals, in part, with the right of a consular officer to see a detained national of his state had as its point of initial disagreement the interpretation of the word "undue". The Japanese side pointed out its

intention

intention that the word "undue" be placed in the third and not the second sentence of Article 16(1), which removes the difficulty with respect to when a consular officer could visit a detained national of the sending state. The Department's views are requested on the acceptability of placing "undue" in the third sentence of this paragraph, thereby limiting it in context to the forwarding of communications from a detained national to his consular officer within the receiving state. The language of the Article would place no qualification upon the promptness with which a consular officer could visit such a national.

8. Agreed Official Minute to Article 17(1)(e) which involves the taking of evidence by consular officers and defines certain courts and laws related to this matter has not only been further clarified but a proposal has been made to make this AOM either Protocol 6 or 7 of the Convention, as appropriate. The clarification desired by the Department will be found in the enclosed minutes of the negotiating sessions.

With respect to the first full paragraph commencing on page 6 of W-279 regarding the service of process by Japanese consular officers in the United States, which the Japanese side desires to formalize through the adoption of its proposed wording for Article 17(1)(e)(i), reference is made to Enclosure No. 3 hereto. This Memorandum of Conversation should be read in conjunction with the following communications enchanged between the Embassy and the Department:

a. Embassy OM of April 4, 1958 entitled "NOTARIALS".

b. Embassy telegram 2838 of April 29, 1958.

c. Department WIROM 2341 of May 2, 1958.

d. Embassy OM of May 9, 1958 entitled "NOTARIALS - Serving of Summons, Petitions, Judgments by Japanese Consuls in the United States".

e. Department instruction A-579 of May 28, 1958 entitled "Service of Legal Process Within the United States by Japanese Consular Officers".

f. Embassy OM of November 17, 1958 (same subject heading as "e" above).

7. Department

g. Department OM of March 7, 1959 (same subject heading as "e" above).

h. Embassy OM of April 7, 1959 (same subject heading as "e" above).

9. Article 23(2) dealing with the exercise of jurisdiction with respect to the internal management of a vessel is the subject of a further proposal by the Japanese side. Japan has agreed to delete the word "internal" from the text of this paragraph or the condition that the following new paragraph to be numbered as new Article 23(3), be inserted between the present 23(2)(b) and 23(3):

"The provisions of the preceding paragraph shall not be construed as prejudicing the right of innocent passage, recognized by international law, of vessels passing through the territorial waters."

A further discussion of this proposal will be found in enclosures one and two.

10. With respect to the Agreed Official Minute to Article 23(2), the Japanese side also agrees to the deletion of "internal" in referring to "the ports or waters of the receiving state" provided the new paragraph it proposes as Article 23(3) is inserted.

11. Protocol 2 which deals with the right of Japanese consuls in the United States to perform consular services for inhabitants of areas referred to in Article 3 of the Peace Treaty with Japan is still in dispute. The Embassy is currently awaiting the Department's position on this matter for transmittal to the Japanese side. The Japanese draft text most recently proposed in this regard was last discussed in the Embassy's T-2833 of April 17, 1962.

12. Protocol 3 which deals with the question of taxation on official income of permanent resident alien consular officers and employees has been the subject of further Embassy study since receipt of the Department's comments concerning this Protocol. Japan is amenable to including reference to Article 13(1) in the new Article on Limitations, paragraph (1); incorporating the

wording

wording of the Protocol into Article 13(1) itself; or leaving Protocol 3 as is. The Embassy believes that the soundest course to follow would be either to incorporate the wording of the Protocol into Article 13(1) or leave the Protocol as it now stands. If Article 13(1) were referred to in paragraph one of the new Article on Limitations, it would deny the privileges of Article 13(1) to an American businessman, for example, who, under the United States system, might be appointed as an American Consular Agent in Japan and is also engaged in private occupation for gain. While the Embassy realizes, as the Department has mentioned, that there would probably be little prospect of such a development, the retention of Protocol 3 or its incorporation into Article 13(1) would provide for any such eventuality.

III. Disposition of Agreed Official Minutes

The integration of the Agreed Official Minutes (AOMs) into the body of the Convention was negotiated ad referendum with the Japanese side as suggested by the Department and agreement has been reached on the following proposals:

1. AOMs to Articles 2(10), 13(3), and 14(3) to be deleted as previously agreed.

2. AOM to Article 2(11) to be deleted because the US has already agreed to the deletion of Article 2(11) itself.

3. AOM to Article 6 to become, in substance, new paragraph 4 in Article 6.

4. AOM to Articles 7 and 12 to become new Protocol 3, with the remaining Protocols to be renumbered accordingly.

5. AOM to Article 10(1) to become a part of the Convention by adding the following as the two final sentences in Article 10(1):

> "In sending or receiving consular pouches through postal channels, a consular officer shall be subject to the postal laws and regulations of the receiving state. Nothing contained in the immediately preceding sentence, however, shall be deemed to affect the provisions of this Article."

6. AOM to

6. AOM to Article 11(1)(a) to become a part of the Convention by adding the following sentence to Article 11(1)(a):

"The consent of the sending state shall be notified to the receiving state in writing through diplomatic channels."

7. AOM to Article 13(2)(a) to become a part of the Convention by adding the following sentence between the first and second sentences in Article 13(2)(a):

"The number of vehicles entitled to such exemption shall be decided in accordance with the laws and regulations of the receiving state, provided that such consular officer or employee shall be entitled to the exemption with respect to at least one vehicle."

8. AOM to Articles 14 and 17 to become a part of the Convention by adding the following sentence as a new subparagraph (f) in Article 14(3):

"(f) Paragraph (1) of this Article and paragraph (5) of Article 17 shall not be construed to prejudice the laws and regulations of the receiving state concerning the consulate's importation of cinema films excluding films for academic or cultural use, and films which are in fact documentary or newsreels, imported exclusively for official use."

9. AOM to Article 17(1)(e) to become Protocol 6 or 7 of the Convention, as appropriate, with the first sentence thereof to read in amended form as follows:

"It is understood that the evidence to be taken by consuls pursuant to Article 17(1)(e) shall include testimony given by expert witnesses, but shall not include any real evidence."

10. AOM to Article 23(2) to become a part of the Convention by adding the following sentence to Article 23(2)(b):

"Crimes or offenses against the laws of the receiving state regarding public health, customs or immigration committed on board a vessel in the ports or internal waters of that state shall be deemed to be included in the crimes or offenses involving the tranquility of the port."

It should

It should be noted that the words "or internal" could be deleted from this AOM if the Department accepts the Japanese proposal for Article 23(2) made at the 11th meeting on April 10, 1962.

11. AOM to the Consular Convention to become a new appropriately numbered paragraph between the present Article 26(2) and (3), as already agreed.

12. AOM to Protocols 1 and 2 to be deleted as previously agreed.

IV. Status of the Convention by Articles and Protocols

1. Article 1. Japan agrees to the retention of this Article, but has inquired regarding its application to US Pacific trust territories.

2. Article 2. The US agrees to the wording of this Article as found in the right-hand column of the comparative texts (see Enclosure No. 4 to Tokyo's D-185 of August 28, 1961).

3. Article 3. This Article remains under discussion.

4. Article 4. There is no change in the previously agreed wording.

5. Article 5. Japan agrees to the deletion of the third paragraph of this Article as desired by the United States. Paragraph four would thus become numbered paragraph three.

6. Article 6. The US agrees to the wording of this Article as found in the right-hand column of the comparative texts.

7. Article 7. The US agrees to the wording of thisArticle as found in the right-hand column of the comparative texts.

8. Article 8. By mutual agreement, the wording of this Article will be found in the right-hand column of the comparative texts except for the wording of 8(3)(a) which will be found in the left-hand column owing to the withdrawal of the Japanese proposal for a word change in this subparagraph. Japan has also made proposals for word changes in Article 8(3)(b) and desires that the order of subparagraphs 3(a) and 3(b) be reversed.

9. Article 9.

9. Article 9. This Article remains under discussion.

10. Article 10. The US agrees to the wording of this Article as found in the right-hand column of the comparative texts.

11. Article 11. This Article remains under discussion.

12. Article 12. By mutual agreement, the wording of this Article will be found in the right-hand column of the comparative texts except for the first line of paragraph 2 which will follow the wording in the left-hand column owing to Japan's withdrawal of the proposal for a word change in this paragraph.

13. Article 13. By mutual agreement, the wording of this Article will be found in the right-hand column of the comparative texts except that (1) the preamble of the new 13(3) will read as given in the left-hand column and (2), in 13(3)(d), "the amusement tax" has been changed to "the hotel and restaurant tax". The first of these word changes is the result of the withdrawal by Japan of a previous proposal. The Japanese side has now proposed that a revised version of the Agreed Official Minute to Article 13(2)(a) be inserted in the Article itself.

14. Article 14. This Article remains under discussion.

15. Article 15. By mutual agreement, the wording of this Article will be found in the left-hand column of the comparative texts.

16. Article 16. This Article remains under discussion.

17. Article 17. The US agrees to the wording of this Article as found in the right-hand column of the comparative texts. Japan has agreed to the US suggestion for a rearrangement of 17(1)(e) (i, ii, iii). The Embassy notes that the Department has not commented on the proposal contained in its D-185 of August 28, 1961 concerning the service of legal process. The Department's views are requested, if it is felt that there is sufficient basis for further exploration of the possibility of obtaining Japanese agreement to the service of United States process in Japan by duly recognized local attorneys.

18. New Article

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18. New Article on Estates and Transfer of Property. By mutual agreement, the wording of the New Estates Article will be found in the left-hand column of the comparative texts. Japan has agreed to the deletion of the phrase "or upon the petition of heirs having the majority interest in such estate" in (2)(b) of the Article as requested by the US. The remaining Articles in this Convention will require renumbering as a result of replacing the old Articles 18, 19, and 20 by the new combined article covering estates and transfer of property.

19. Article 21. The US agrees to the wording of this Article as found in the right-hand column of the comparative texts.

20. Article 22. The US agrees to the wording of this Article as found in the right-hand column of the comparative texts.

21. Article 23. This Article remains under discussion.

22. Article 24. The US agrees to the wording of this Article as found in the right-hand column of the comparative texts.

23. Article 25. There is no change in the previously agreed wording.

24. New Article on Aircraft. The US agrees to the wording of this Article as found in the right-hand column of the comparative texts.

25. New Article on Limitations. The US agrees to the wording of this Article as found in the right-hand column of the comparative texts.

26. Article 26. The US agrees to the wording of this Article as found in the right-hand column of the comparative texts.

27. Article 27. There is no change in the previously agreed wording.

28. Protocol 1. Japan has agreed to the wording of this Protocol as found in the left-hand column of the comparative texts. However, Japan has asked for clarification concerning the application of the following phrase in Article 1, "..... comprise all areas of land and water subject to the sovereignty or authority of either High Contracting Party....," with respect to US Pacific trust territories. Japan asked, "Would these territories be considered as being under the authority of the US for purposes of this Convention?" The Japanese side stated that it may propose additional

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additional language, which was not disclosed, to clarify this point. The Department's instructions will be appreciated regarding the nature of the reply that should be ma de to this specific question from the Japanese side.

29. Protocol 2. This Protocol remains under discussion.

30. Protocol 3. This Protocol remains under discussion.

31. Protocol 4. There is no change in the previously agreed wording.

32. Protocol 5. The US agrees to the deletion of this Protocol.

33. Protocol 6. Japan agrees to the wording of this Protocol as found in the left-hand column of the comparative texts.

For the Ambassador:

Ralph J. Blake
Counselor for Consular Affairs

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United States-Japan Consular Convention Negotiations
February 19, 1962 to April 27, 1962

Article 1

(Seventh Meeting)

US: The Department desires the retention of Article 1 as it believes the Japanese proposal for the elimination of this Article would result in showing only where the Convention does not apply and leave to guesswork where it would apply. Article 1 is accepted terminology in many US treaties and its retention is highly desired. If this Article is retained, it would not be necessary to change the wording of Protocol 1. It is noted that Japan stated in the second negotiating session on July 19 that the Article in itself was not objectionable.

Japan: One reason for our desire to eliminate this Article is that it does not appear in the US-Iranian treaty of 1955 relating to amity, economic relations, and consular rights. We, therefore, thought it should be eliminated. We note in response to your suggestion, however, that the US-UK treaty does have an article dealing specifically with territorial applicability. Does the United States take a strong position on the retention of Article 1?

US: The US position has not been presented to the Embassy as being irrevocable but it is the US view that the Article provides for positive rather than negative phraseology which the United States considers a highly desirable feature in the Consular Convention.

Japan: We understand your position and will consider the matter further.

(Eleventh Meeting)

Japan: Japan agrees to the retention of Article 1 ..... as proposed by the United States. /See discussion under Protocol 1, Eleventh Meeting, regarding query by Japanese side as to application of Article 1 to US Pacific trust territories./

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Articles 2(7), 2(9), and 2(10)

(Seventh Meeting)

US: The United States accepts the GOJ proposal regarding Articles 2(7), 2(9) and 2(10).

AOM to Article 2(10)

(Seventh Meeting)

US: With respect to the Agreed Official Minute to Article 2(10), the Department does not accept the Japanese proposal because it believes that definitions in such cases are dangerous and should be left to ad hoc determination as the need arises. As a practical matter, the duties of these positions overlap and, while perhaps necessary for internal Japanese purposes, would be hard for the United States Government to justify for its own personnel.

Japan: What do you mean by ad hoc determination?

US: An example would be the designation of an employee in one or the other of the two consular employee categories, now agreed to in Article 2(10), when and if there is a necessity to do so.

Japan: If the GOJ should decide upon a standard for determining the categories in which an employee belongs, would the Embassy have objections to this determination?

US: The language of the Convention would seem to make such a unilateral determination possible, but the United States might wish to consult with the GOJ in a particular case.

Japan: In arriving at a decision on a matter of this kind, the GOJ would very likely have to obtain views of other Ministries before making its determination.

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US: This is illustrative of the desirability of an ad hoc arrangement. It would seem that the terminology of Article 2(10) by itself is sufficient for present purposes of definition and would appear to us to meet in large measure the needs of the GOJ for the categorizing of personnel.

Japan: If there should be a difference of views between the United States and Japan on this matter, the receiving state could then make the ultimate decision--is that not correct?

US: We believe this is accepted diplomatic practice, subject to reciprocity and the right of representation from the sending state.

Japan: We understand your standpoint and will consider the matter further.

(Eleventh Meeting)

Japan: Japan agrees ..... to the deletion of the Agreed Official Minute to Article 2(10) ..... as proposed by the US.

Article 2(11)

(Seventh Meeting)

US: The United States agrees to the Japanese proposal regarding Article 2(11).

Article 3

(Seventh Meeting)

US: With respect to Article 3(1) which deals with the establishment and location of consular offices, the United States continues to reject

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the inclusion of the most-favored-nation principle. As we informed you at the second meeting on July 19, the United States has found it necessary from time to time to order closed all consular establishments of a particular country or to restrict them to particular localities. To avoid possible future misunderstandings and to retain necessary flexibility the United States cannot hereafter agree to such a provision in any new Consular Convention. The most-favored-nation principle is not in the short form text and it is the US intention to employ the provisions of the short form text as a model for its future Consular Conventions.

Japan: We will consider this matter further.

Japan: Do Articles 3(2) and (3) need revision?

US: The United States desires the US wording of Articles 3(2) and (3) as contained on the left side of the comparative texts, for the same reasons noted above with respect to Article 3(1).

(Eleventh Meeting)

Japan: Japan agrees to the ..... wording for Article 3 as proposed by the US.

(Thirteenth Meeting)

Japan: When we were discussing Article 3(1) last summer, on July 19, 1961, we asked whether the wording of the second sentence of Article 3(1) would provide for the establishment of branch offices of a consulate general or consulate and we believe you replied that the wording of this sentence would not appear to exclude the establishment of such branch offices. We would like a clearer statement from you on this point.

US: What do you mean by branch offices?

Japan: In our Foreign Office Establishment Law there is a provision for the establishment of a branch office of a consulate general or

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consulate. We can foresee the possible establishment of a branch of the New York Consulate General in Boston with a Vice Consul in charge. Theoretically, it would be possible to designate a Boston branch as a full Consulate but from a budgetary point of view it might be more difficult to accomplish.

US: We forwarded the exchange of views to which you have just referred to the Department last summer and the Department did not indicate its objection to the Embassy's view that the second sentence of Article 3(1) would not exclude the establishment of a branch office of a Consulate General or a Consulate.

Japan: We would then like to amend the same second sentence of Article 3(1) to read as follows:

> "The sending state may in its discretion designate a consular office as a consulate general, consulate, their branch offices, vice consulate, consular agency, honorary consulate general, or honorary consulate."

We recall that the initial reference to "honorary consul" was made in the first negotiating session on April 17, 1953 at which time the US side stated in effect that honorary consulate general or honorary consulate would be covered by this Convention.

US: We will forward your new proposal to the Department.

Article 5(3)

(Seventh Meeting)

US: With respect to Article 5(3) the United States has strong views. We have been instructed to inform you that the presence of such a provision as you propose would produce an undesirable element of uncertainty into the interpretation of the Convention. It would also enable the GOJ to claim certain privileges set forth in older treaties

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which the United States might not wish to agree to at this time. For these reasons the most-favored-nation principle was eliminated from the short form text as it applied to this particular Article.

Japan: We feel that if the United States in future consular conventions were to grant more privileges and immunities to a third country than are included in this Convention, Japan would desire the same rights and privileges. We have no intention of claiming the same privileges as contained in older treaties between the United States and third countries but only in future conventions. We would like to see Article 5(3) amended so that a phrase such as "in the future" could be inserted between "accorded" and "to" in Article 5(3).

US: While we wish to reiterate that the United States is firm in its rejection of the most-favored-nation principle as so far discussed in relation to Article 5(3), we shall inquire of the Department concerning the acceptability of your modified proposal. Could you give us a further explanation of why you desire the most-favored-nation principle included in this Consular Convention?

Japan: The United States might give more privileges to a third state in future conventions than provided for in this Convention and Japan would want the same privileges.

(Eleventh Meeting)

Japan: Japan will await the US response to its proposal for the inclusion in Article 5(3) of the phrase "in the future" between the words "accorded" and "to" in this paragraph.

(Thirteenth Meeting)

US: We have received instructions from the Department concerning Article 5(3) and have been directed to inform you that the US cannot agree to the Japanese proposal for most-favored-nation (MFN) treatment with respect to future consular conventions. It desires that paragraph

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5(3) be deleted from the Convention as earlier proposed by the US. The following reasons are set forth for this position:

(1) Inasmuch as it is highly unlikely that more privileges than are now provided for in the Estates Article will be approved in other consular conventions which the US might negotiate, MFN treatment would have little substantive value. Other consular functions, such as, for example, notarials and shipping, are of little controversy and are generally uniform and routine. It is unlikely that there will be any significant change in these matters in the future.

(2) The upcoming 1963 Vienna convention on consular intercourse and immunities will very likely set a pattern for future consular conventions. It would appear unlikely that the US draft of the proposed Consular Convention with Japan, as well as any other future US convention, and the 1963 agreements would differ substantially in content.

(3) A consular convention not only should stand on its own feet and not have to be buttressed by the provisions of other conventions, but should not be encumbered by the factor of vagueness as already discussed at earlier meetings.

Japan: Are we correct in understanding that the US changed its policy in 1957 from including to excluding MFN treatment provisions in consular conventions?

US: As far as we are aware, there have been no post-war precedents for the inclusion of MFN treatment provisions in a US consular convention since the US/UK, US/Ireland, or US/Costa Rica conventions which were negotiated before the US changed its basic policy with respect to MFN treatment which we believe occurred around 1957.

Japan: We understand your position and will give our answer later.

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(Fourteenth Meeting)

Japan: With respect t rticle 5(3), the Japanese side has noted the explanation given by the US delegation to the effect that any other future US consular conventions would probably not differ substantially from this draft Japan-US convention and agrees to its deletion from the Convention.

Article 6(4)

(Seventh Meeting)

US: With respect to the proposal concerning a new paragraph for Article 6(4), you will recall that there was the option of either this new paragraph or an Agreed Official Minute. The United States is agreeable to the new paragraph and as the GOJ has likewise indicated its preference for the new paragraph rather than the Agreed Official Minute, there seems to be no difference of opinion. It is therefore mutually agreed to include the new paragraph as Article 6(4). The United States would like to point out, however, that the object of the new paragraph could also be achieved merely through administrative action.

Japan: The GOJ does not anticipate having to invoke the provisions of this paragraph between the United States and Japan but desires its inclusion for precedent purposes in connection with negotiating consular conventions with other states.

Article 7(1)

(Seventh Meeting)

US: As you will note, the United States agrees to the GOJ's proposal regarding Article 7(1).

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Article 8(3)

(Eighth Meeting)

US: With respect to Article 8(3), when this Article was discussed last summer, you proposed that the following words be used in order to remove what the Japanese Government considered was ambiguity in the text: "the archives of the consular office". The United States is of the opinion that the wording contained in the left-hand column of the comparative texts is not ambiguous. It believes that acceptance of the Japanese proposal could mean that the archive documents need not be kept in the consular office, but could be anywhere. Thus, for purposes of evidence in a court proceeding, for example, who would decide whether a document found outside the consular establishment should be classified as an archive document and thereby obtain inviolable status?

Japan: If Article 8(3)(a) and (b) were read together, it would show that such inviolability would exist only if the document is located in a consular office. We will, however, consider the matter further. We believe it to be a minor problem.

(Eleventh Meeting)

Japan: Japan withdraws its proposal for a word change in Article 8(3)(a). However, we would like to suggest that the present subparagraph 3(a) become 3(b) and 3(b) become 3(a). This switch in the order of subparagraphs would avoid the interpretation that the term archives might refer to archives which are not those of a consular office. We would further wish to propose in the existing Article 8(3)(b) that the term "consular officers and employees" be substituted for "such officer".

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Articles 8(4) and 9(2)

(Eighth Meeting)

US: In Articles 8(4) and 9(2), the changes proposed by Japan are acceptable to the United States.

Article 9(4)

(Eighth Meeting)

US: With respect to Article 9(4), the United States would prefer the original wording contained in the left-hand column of the comparative texts. The Department made the observation that there is not a general understanding in many foreign countries of the United States Government's desire to obtain due compensation for seized property. In last summer's discussions of this Article, you indicated that the United States' wording was not technically adequate and too specific and you also referred to the possibility of rendering compensation in kind. It would be appreciated if you would explain further your position in this matter.

Japan: There are several reasons for our proposal. In the first place, if the US wording were accepted, it would not in fact provide for compensation in kind. Secondly, there would very likely be problems with respect to establishing the exchange rate--would it be based on the bank's selling rate, its buying rate, or on the official rate?

US: It is believed that in international practice the bank's selling rate, not buying rate, establishes the monetary basis for paying compensation if an established official rate of exchange is not controlling.

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Japan: There are several other reasons why we wish to have our proposal adopted. The official rate of exchange in Japan may be abolished in the future because of the liberalization of foreign exchange. Also, the treaty of friendship, commerce and navigation between the United States and Japan does not go into as much detail on this matter as does your wording for Article 9(4).

With respect to compensation in kind, this might include the offer of an alternative piece of land or an alternative building for seized property.

US: One method of clarifying the wording of Article 9(4) might be to insert the phrase "or bank" between "official" and "selling rate" in the Article.

Japan: We will have to consult with officials of the Finance Ministry on this matter. Would it be acceptable to delete the second line of Article 9(4) and make it an Agreed Official Minute? The Finance Ministry may consider the retention of the second sentence of Article 9(4) as an undesirable precedent for future international agreements. At any rate, we will be prepared to discuss this matter with you at a later meeting.

(Eleventh Meeting)

Japan: With respect to Article 9(4), Japan wishes to propose the following sentence as an alternative to the second sentence of this paragraph:

> "Compensation shall be payable in a form readily convertible into the currency of and transferable to the sending state, not later than three months from the date on which the amount of compensation has been finally fixed."

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Japan is not in a position to promise that compensation for seized property will be determined on the basis of the exchange rate prevailing at the time of seizure. Rather it would prefer to make such a determination on the basis of the exchange rate at the time of remittance.

US: In view of this position, would Japan give consideration to a possible depreciation factor in determining compensation?

Japan: In such a case, Japan may give due consideration to the special situation involving depreciation on a case by case basis. The principal reason for our proposal is that we could foresee that bank selling rates could differ with respect to (1) the date the property is seized, (2) the date the amount of compensation is fixed, and (3) the date the compensation is remitted. The Finance Ministry would agree to pay at the bank's selling rate at the time of remittance.

US: We will transmit your views to the Department.

Article 10(1)

(Eighth Meeting)

US: The Japanese proposal with respect to Article 10(1) is acceptable to the United States.

Article 11(1)

(Eighth Meeting)

US: The Japanese proposal with respect to Article 11(1)(a) is not acceptable to the United States. The important difference in our

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two positions relates to the desire of Japan to withhold from nationals of the receiving state who are employed in consulates of the sending state immunity from the jurisdiction of courts of the receiving state for official acts. The United States considers that official acts performed by consular employees who are nationals of the receiving state are acts of the sending state. The immunity in question, therefore, is not a simple personal immunity of the consular employee but rather an immunity attaching to the foreign state as such. The minimum immunity needed in order for a consular employee to be able to exercise his functions is the immunity from jurisdiction granted in respect of official acts. The receiving state may, of course, of its own accord grant the employees in question any other privileges or immunities. The Department has referred to Article 69 of the International Law Commission's draft convention on consular intercourse and immunities to explain its position. The Consular Convention between the United States and Japan should specifically provide that consular employees who are nationals of the receiving state are exempt from the jurisdiction of courts of the receiving state for official acts.

Japan: From our point of view, there is no difference between our proposal for Article 11(1)(a) and the purport of the International Law Commission's draft. Article 69 means in effect that consular employees who are nationals of the receiving state shall be subject to the jurisdiction of the receiving state but that, in exercising such jurisdiction, the receiving state shall use self-restraint.

US: The United States wants to go further than this in order to make it crystal clear that such employees are immune from the jurisdiction of courts of the receiving state for official acts.

Japan: We will study the matter further.

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(Eleventh Meeting)

Japan: Article 11(1)(a) is still being considered by the Japanese side.

(Fourteenth Meeting)

Japan: With respect to Article 11(1)(a), Japan is not yet in a position to accept the US draft for this subparagraph as it now stands. Acceptance of the US position might result in according greater privileges and immunities to employees of a consulate who are nationals of the receiving state than to employees of a diplomatic mission who are nationals of the receiving state. As a compromise we prepared two alternative proposals. We would propose that without altering the wording of subparagraph 11(1)(a) as it was previously suggested by Japan, the following new sentence be added in the same subparagraph:

> "However, it is the common intention of the High Contracting Parties that the administrative authorities of the receiving state should not institute prosecutions against a consular employee who is a national of the receiving state in respect of such acts unless they are committed through willful misconduct or gross negligence."

Alternatively, we would propose that the following new sentence be added after the original US draft of this subparagraph:

> "However, the courts of the receiving state shall not be precluded from exercising jurisdiction upon a consular employee who is a national of the receiving state in respect of crimes committed through willful misconduct or gross negligence."

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US: The United States would be interested in any elaboration you may wish to make on the terms "willful misconduct" and "gross negligence".

Japan: For example, if a Japanese driver of an American Consulate while on official business were to go through a red light, hit a pedestrian, and leave the scene of the accident without offering appropriate assistance to the victim, he would be considered as having committed an act through willful misconduct or gross negligence. Furthermore, under the provisions of the Vienna Convention on Diplomatic Relations (Article 38, paragraph 2), a corresponding employee of a diplomatic mission would enjoy privileges and immunities only to the extent admitted by the receiving state. It might be observed, however, that there has never been a case to our knowledge in which a Japanese employee of a consulate or a diplomatic mission in Japan has been prosecuted for having committed crimes due to gross negligence or willful misconduct.

US: Our concern does not relate solely to so-called hit and run crimes, as the United States would be just as concerned as the Japanese authorities about a local Japanese employee who was involved in such a crime and would certainly not condone the action. Our principal concern is to insure that local Japanese employees who carry out official acts on instructions from a consular officer are immune from Japanese jurisdiction.

Japan: If a Japanese local employee of a consulate were to commit a crime while carrying out official acts under instructions and yet be unaware that he was breaking a law, he would not be considered as having committed a crime due to willful misconduct or gross negligence and would probably not be prosecuted. However, if in carrying out his assignment he were knowingly to break the law, he would be considered as having committed willful misconduct. For example, to bribe a government official for the purpose of obtaining confidential information would be regarded as willful misconduct. We wish to make it clear that Japan's principal concern here is to have jurisdiction over a Japanese local employee of an American consular office who, for example, while driving a car,

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kills or seriously injures a pedestrian through gross negligence or willful misconduct. If we are not to experience difficulties in the ratification process, we must be able to assure Diet members that such an employee would not be immune from Japanese jurisdiction.

US: At the beginning of this discussion, you stated that a reason for desiring the adoption of your proposal was that you did not desire to accord local employees of a consular office more privileges and immunities than local employees of a diplomatic mission. Is that your principal concern?

Japan: From a theoretical point of view, yes. From the practical point of view, however, our concern is mostly with drivers and our proposal would only be applicable to those employees who commit crimes with willful disregard of the laws of the receiving state. If the US side believes that our proposal is not sufficiently clear in its explanation of "willful misconduct" and "gross negligence", we would be prepared to consider some minor drafting changes.

US: We will inform the Department of your proposals.

AOM to Article 11(1)(a)

(Tenth Meeting)

US: With respect to an Agreed Official Minute to Article 11(1)(a), the United States can agree to your proposal provided the Agreed Official Minute becomes a part of Article 11.

Japan: We would propose the following rephrased wording to follow the last sentence of Article 11(1)(a):

"The consent of the sending state shall be notified to the receiving state in writing through diplomatic channels."

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If this wording is added to Article 11(1)(a), the Agreed Official Minute can be eliminated.

US: We appear to be in agreement on this change.

Article 11(2)

(Eighth Meeting)

US: With respect to the new paragraph to follow Article 11(2) the Department wishes to delete the words "in virtue of the provisions of preceding paragraphs" since the receiving state exercises its jurisdiction by virtue of powers inherent in it, not pursuant to Article 11(1) and (2). If these words are deleted, the United States could agree to the new paragraph.

Japan: We will study this proposal in connection with Article 11(1).

(Eleventh Meeting)

Japan: With respect to the new paragraph to follow Article 11(2), Japan agrees to the deletion of the words "in virtue of the provisions of preceding paragraphs" from the text of this new paragraph.

Articles 11(3) and 11(5)

(Eighth Meeting)

Japan: What is your position with respect to our proposal for Article 11(3)?

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US: The change you propose for Article 11(3) is similar in nature to those already approved by the United States so there would be no objection to the Japanese proposal.

The Japanese proposal with respect to Article 11(5) is acceptable to the United States.

Article 12(2)

(Eighth Meeting)

US: With respect to Article 12(2), we would appreciate more background information on the logic of not differentiating between direct and indirect taxes for the purpose of this paragraph. Is the Consular Convention a proper place for distinguishing between direct and indirect taxes? Moreover, as this appears to be an internal Japanese Government problem, could not the necessary adjustments be made by Japan without affecting the content and phraseology of the Convention?

Japan: It would not appear very difficult for us to accept the original wording of Article 12(2). However, we will have to discuss it with the Local Autonomy Ministry.

(Eleventh Meeting)

Japan: Japan accepts the original wording of the preambles of Articles 12(2) and 13(4) /new 13(3)/, deletion of the word "career" from the preamble of Article 12(2) being already agreed to.

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Article 13(2)(a)

(Eighth Meeting)

US: The Japanese proposal with respect to Article 13(2)(a) is acceptable to the United States.

AOM to Article 13(2)(a)

(Eighth Meeting)

US: With respect to the Agreed Official Minute for Article 13(2)(a), it would be helpful to have more information on the purpose of this proposed addition. The United States would wish to avoid the interpretation that the Agreed Official Minute could be used to limit the exemptions listed in 13(2)(a).

Japan: The Japanese Government does not intend to limit the exemptions contained in 13(2)(a) by use of the Agreed Official Minute. However, the Local Autonomy Ministry has indicated that it does not want to have the privileges of this Article cover the ownership of more than one car. If a consular officer could register an indefinite number of cars as is theoretically possible by claiming the privileges of Article 13(2)(a), there might be someone who would take advantage of this privilege. There is also the additional problem of having to register cars owned under the provisions of 13(2)(a) with the Foreign Office before taxes can be exempt on such automobiles.

US: The United States concern is not to arrange for special privileges for the ownership of more than one vehicle but simply to insure that the Agreed Official Minute could not be interpreted to limit the rights granted by 13(2)(a). For example, if the Japanese Government did not wish to allow a consular officer to own an automobile under the provisions of 13(2)(a), the officer could be prevented from

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doing so by refusal of the Foreign Ministry to register his automobile or issue him consular license plates. The United States wishes to be satisfied that the provisions of 13(2)(a) could not be abridged by such administrative action.

Japan: We will attempt to draft a substitute Agreed Official Minute which we hope will be satisfactory to both sides.

(Eleventh Meeting)

Japan: With respect to the Agreed Official Minute to Article 13(2)(a), Japan proposes that this Agreed Official Minute be incorporated into the text of the Article by adding the following sentence between the first and second sentences of this subparagraph:

> "The number of vehicles entitled to such exemption shall be decided in accordance with the laws and regulations of the receiving state, provided that such consular officer or employee shall be entitled to the exemption with respect to at least one vehicle."

Article 13(3)

(Eighth Meeting)

US: With respect to Article 13(3), the Japanese Government, in last summer's meetings, expressed the desire not to define the taxes referred to in this Article as either direct or indirect. It is the US view that the wording in the left-hand column of the comparative texts does not characterize the nature of these taxes as either direct or indirect and the United States would not therefore desire to frame paragraph 3 in the affirmative since it is not the purpose of a consular convention to say what taxes may be imposed but rather to allow local law to define such taxes and merely provide exemptions therefrom

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in the Convention. It would appear to us that this is another example of an internal Japanese Government problem which could better be adjusted outside rather than inside the Con tion. From the long term point of view, both sides would probably benefit from a statement specifying exemptions from taxes rather than a statement listing taxes to be imposed since it is not possible to know in advance what future circumstances might exist requiring the imposition of a particular tax or taxes not contemplated at the time the Consular Convention is conclude

Japan: One reason for our desire to have our proposal accepted is that the Local Autonomy Ministry is worried about the application of the definition of direct and indirect taxes to future consular conventions and to the Vienna Convention which is presently under study by the Japanese Government. We would further wish to point out that in Article 34 of the Vienna Convention there is a reference to indirect taxes. However, we will discuss the matter with the Local Autonomy Ministry and give you our views at a later date.

US: With respect to Article 13(3)(d), the United States will give its decision later. /The acceptability of the proposed diesel oil delivery tax was still under discussion within the Embassy at the time of the Eighth Meeting./

(Ninth Meeting)

US: With respect to the diesel oil delivery tax referred to in Article 13(3)(d), the Japanese proposal is acceptable to the United States.

(Eleventh Meeting)

Japan: We wish to draw your attention to a minor change required in Article 13(3)(d) which appears in the right-hand column of the US-Japan comparative texts. The term "amusement tax" was changed last year to "hotel and restaurant tax" so this subparagraph now reads, "taxes

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on use of amusement facilities, the hotel and restaurant tax, the spa tax, the traveling tax, taxes on electricity and gas, and the diesel oil tax." However, this tax is the same amusement tax which was defined as applying to hotels, restaurants and tea houses when it was first discussed at the July 27, 1953 meeting. / See discussion under Article 12(2), Eleventh Meeting, in which Japan agreed to the original wording of the preamble to Article 13(3)./

Article 13(4)(a)

(Eighth Meeting)

US: The Japanese proposal with respect to Article 13(4)(a) is acceptable to the United States.

Article 14

(Ninth Meeting)

US: With regard to Article 14(2), the United States accepts the proposal to limit its application to "a consular officer" but would prefer the wording in the left-hand column of the comparative texts with respect to the Japanese desire to include "forming part of his household" as a definition of family members to receive the benefits of this paragraph. The United States considers the proposed Japanese wording to be far from what is believed would be sufficient clarity. For example, does the term "forming part of his household" include adult unmarried daughters or parents? It is the US view that those persons not residing regularly with the consular officer or not necessarily present for his welfare or comfort should not be entitled to exemptions from custom duties.

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Japan: The Japanese draft states that such exemptions would be accorded members of the consular officer's family "forming part of his household" and we believe that this wording is more definitive than the text of the US draft.

US: The United States desires to avoid the interpretation that people not regularly residing with the officer can have the privileges of this Article.

Japan: For example, the Japanese draft would permit a daughter or son not residing with the parents, but elsewhere in the receiving state (such as at a boarding school) and supported by them, to receive the benefits of this Article but would withhold such benefits from a son or daughter, as well as a parent, residing with the consular officer but working and receiving a salary substantially sufficient for self-support.

US: We appear to be in substantial agreement on this. However, the United States does not want to go too far in extending these privileges.

Japan: We used the wording of Article 37 of the Vienna Convention as a basis for our proposal and inasmuch as it is quite possible that the Vienna Convention and this Consular Convention will be submitted to the same session of the Diet, we would wish to avoid explaining differences of wording. If the United States has misgivings about the phraseology, however, we would be prepared to draft an Agreed Official Minute for purposes of clarification. We will discuss this matter further at a later session.

US: The new paragraph proposed for Article 14 is agreeable to the United States.

(Eleventh Meeting)

Japan: With respect to Article 14(2), we are awaiting the US position. As explained at the ninth meeting held on March 5, 1962, we still wish

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to amend the definition of "family" so it will conform to the wording used in the Vienna Convention on diplomatic relations. We also anticipate that the 1963 Vienna Conference on consular affairs will adopt the same wording as we propose.

Article 15(4)

(Ninth Meeting)

US: With respect to Article 15(4), the concern of the United States rests with the interpretation of the word "administrative". The Japanese wording might be construed as permitting authorities who are not "administrative" to prevent access to the consular officer. In addition, since it is believed usual in consular conventions to regulate by granting rights and not by imposing restraints, we are of the view that the wording in the left-hand column of the comparative texts would be more desirable.

Japan: This appears to us to be a drafting change and we will consider the matter further.

(Eleventh Meeting)

Japan: With respect to Article 15(4), Japan accepts the original wording of this paragraph.

Article 16(1)

(Ninth Meeting)

US: With respect to Article 16(1), the word "undue" was omitted from the US text to alleviate problems of definition, since otherwise in any particular circumstance there could be a delay but it could be said not to be undue. It is believed that the Japanese wording would make the right of immediate visitation more prone to controversy.

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Definitions, as we have noted elsewhere, can sometimes be dangerous. We would not wish to have delay sanctioned by the wording of this Convention.

Japan: There seems to be some misunderstanding about where "undue" should be placed in the text. Rather than placing it in the second sentence of Article 16(1), it should correctly be placed in the third sentence of Article 16(1) between the same words "without" and "delay", but in reference to a "communication" and not to a "visit".

US: If "undue" is placed in the third rather than the second sentence of this Article, it may substantially remove the objections voiced by the Department. We shall inform the Department of this correction.

Japan: The implicit purpose of using the word "undue" is to prevent a detainee from hiding or destroying evidence by forwarding messages through his consul asking for the concealment or obliteration of material facts relating to the cause for his detention. Under the Japanese view, the authorities of the receiving state should be permitted to delay the forwarding of such messages until countermeasures necessary to protect all existing evidence can be taken in accordance with prison laws and regulations. We will, however, look into the matter further and discuss it at a later time.

(Eleventh Meeting)

Japan: With respect to Article 16(1), we are awaiting the US position.

US: Would the wording of Article 16(1) permit a consular officer to visit a detained national of the sending state as many times as he chose?

Japan: In principle, a consular officer would be allowed to visit a detained national of the sending state as many times as he wished provided that these visits would not interfere unduly with the investigation of a

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case. It is interesting to note that in the International Law Commission draft, which will serve as a basis for discussions at the multilateral convention on consular affairs, the phrase "without undue delay" is used in Article 36(1)(b).

Article 17(1)(e)

(Ninth Meeting)

US: With respect to Article 17(1)(e), there is no US objection to the substance of the Japanese proposal. However, to ensure that the phrase "any person in the receiving state in accordance with ....." following (iii) modifies (i) and (ii) as well, it should be set off as follows:

> (e) (i) serve judicial documents, on behalf of the courts of the sending state, upon or
> (ii) take evidence, on behalf of the courts of the sending state, voluntarily given by, or
> (iii) administer oaths to
> any person in the receiving state in accordance with the laws of the sending state and in a manner not inconsistent with the laws of the receiving state.

Japan: This is agreeable.

US: In last summer's negotiating sessions, Japan, in referring to Article 17, asked for an explanation concerning the "special arrangements" provision of Article 17(1)(g) of the US-UK Consular Convention. The Department has instructed the Embassy to advise the Japanese Government that no such arrangements have ever been made and since the provision for such arrangement was never implemented it was not felt necessary to propose it in this Consular Convention.

Are we correct in assuming that Japanese consular officers now serve judicial documents on United States as well as Japanese nationals in the United States?

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Japan: That is correct.

US: We would appreciate further background information on this matter.

Japan: Since receipt by the Ministry of the memorandum dated June 8, 1958 from Mr. Baldwin of the Embassy, Japanese consuls in the United States have been serving judicial documents on US as well as Japanese nationals.

US: What would be the attitude of Japan to a proposal giving duly registered and designated lawyers in Japan the authority to serve US legal process? Under US laws, US consular officers cannot normally serve such documents and therefore it would seem to be desirable to develop a procedure for rendering such service.

Japan: Our intention with respect to Article 17(1)(e) was to exclude lawyers duly registered to practise in Japan from serving judicial documents.

US: Article 17(1)(e) would have no practical effect from the US point of view as US consular officers in Japan cannot serve legal documents in the great majority of cases.

Japan: The Supreme Court and the Ministry of Justice object to lawyers serving documents in Japan but we will endeavor to obtain confirmation of this position. Do you propose to cover this matter in the Convention?

US: Not necessarily.

(Fourteenth Meeting)

US: During our discussion of Article 17(1)(e) at the ninth meeting on March 5, we believe you stated that the Supreme Court Secretariat and the Justice Ministry objected to the service of process by duly

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registered lawyers in Japan, but that you would attempt to confirm this position. Have you been able to obtain such confirmation?

Japan: There continues to be objection to this practice.

AOM to Article 17(1)(e)

(Ninth Meeting)

US: With respect to the Agreed Official Minute to Article 17(1)(e), the United States would appreciate a further explanation of the need for such an Agreed Official Minute.

Japan: The purpose of proposing this Agreed Official Minute was to obtain for the Ministry of Justice confirmation in writing concerning the matters covered in the Agreed Official Minute. You will note, for example, that the Japanese judge referred to in the Agreed Official Minute has the same power as a Japanese court but does not himself represent a court per se. As for the reference to US commissioners, this was intended to reflect a sort of reciprocity.

(Eleventh Meeting)

Japan: With respect to the Agreed Official Minute to Article 17(1)(e), Japan is awaiting the US position.

Article 17(4)(b)

(Ninth Meeting)

US: With respect to Article 17(4)(b) the United States has agreed to the Japanese proposal.

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New Estates Article

(Ninth Meeting)

US: With respect to paragraph 1 of the New Estates Article, the United States believes that under the Japanese proposal the obligation to notify is greater in that it would have to be made for any deceased person and not merely for a deceased person without any known heir or testamentary executor within the receiving state. The United States believes that the Japanese proposal goes too far, since if the deceased person has a local executor or near relative, that person should do the necessary notifying. Would not your proposal place too great an obligation on the authorities of the receiving state? It is our conclusion that the US wording would require less work by consular officers.

Japan: Under the US draft, authorities of the receiving state must confirm that there is no next-of-kin in the receiving state and this was considered an unnecessary chore. The Japanese draft would not require authorities of the receiving state to make such a confirmation. Furthermore, the US draft would call upon the authorities of the receiving state to make the required notification as promptly as possible. The Japanese draft does not make this obligation so urgent. However, we do not have strong feelings on this matter so we will study your proposal and be ready to discuss the Article at a later meeting.

US: During last summer's sessions you requested an explanation of the difference between 2(a) and 2(b) in the Estates Article. We are now prepared to give you such an explanation and also to inform you of a further necessary technical change required in the New Estates Article.

Japan: We would prefer that you defer discussion of 2(a) and (b) and the additional technical change required until the next meeting when we will have an official of the Ministry of Justice present.

(Tenth Meeting)

US: At the fifth negotiating session on August 2, 1961, you asked about the difference between taking provisional custody of an estate

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and administering an estate as covered by paragraphs 2(a) and 2(b) of the Property and Estates Article. The Department has instructed us to inform you that 2(a) relates only to the preservation of personal assets while 2(b) is broader and encompasses real property. By the terms of the Department's instructions, real property would not be included under personal assets. The US believes that administration of an estate of a national of the sending state should not be given to a consular officer of the sending state when such nationals may have resided in the receiving state for many years and acquired considerable assets, including real property.

Japan: Does paragraph 2(a) exclude real property?

US: Yes it does.

Japan: With respect to the application of paragraphs 2(a) and 2(b), is it necessary that the deceased die in the receiving state or could he die outside the receiving state?

US: If the deceased has property in the receiving state and has there no heir or testamentary executor, irrespective of where he dies, the provisions of paragraphs 2(a) and 2(b) would apply.

With respect to the required technical change, the United States desires to delete the words "or upon the petition of heirs having the majority interest in such estate." This phrase was originally made a part of the recent revision of the Estates Article to meet the objection that while a consular officer might have himself named as administrator, the principal heirs may have some other person in mind. On further reflection, however, the phrase was considered to be so uncertain in its wording that unnecessary litigation would probably result. Such wording might give rise to prolonged lawsuits between disputing heirs and this could delay settlement of an estate. The proposed deletion constitutes no change of real substance in paragraph 2(b) since the immediately preceding clause still provides that a consular officer shall relinquish administration of an estate upon the appointment of another administrator. This deletion is essential for US acceptance of the Convention.

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Japan: We probably will be able to agree to your proposal but will give our final answer later.

(Eleventh Meeting)

Japan: With respect to the Estates Article (1), Japan accepts the text of this paragraph as proposed by the United States and further agrees to the deletion of the last two lines of (2)(b) of the Estates Article which read: "or upon the petition of heirs having the majority interest in such estate."

Articles 21(1), 21(2), and 22(3)

(Ninth Meeting)

US: The Japanese proposals with respect to Articles 21(1), 21(2), and 22(3) are acceptable to the United States.

Article 23(2)

(Ninth Meeting)

US: With respect to 23(2), the United States would prefer not to use modifiers before the word "waters" since the terms "territorial waters" and "internal waters" have definite meanings ascribed to them in other contexts and both differ in scope. It is therefore proposed that the word "water" not be modified by either term, much as is done in Article 7 of the short form. The other two changes proposed by Japan for Article 23(2)(b) are acceptable to the United States.

Japan: We may have to ask clarification from the United States if the word "waters" is used without modifiers as it would not be clear

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whether you mean internal, territorial, or both. In order to accept the US proposal, it must be clear whether "waters" means "internal" or "territorial" or both. We will need such clarification when the Convention is submitted to the Diet for ratification. Furthermore, we do not wish to deal in this Convention with questions arising with respect to "territorial waters", which should properly be dealt with pursuant to the Convention on the Territorial Sea and the Contiguous Zone signed at Geneva. We will, however, study this matter further and may request that you obtain clarification from the Department.

(Eleventh Meeting)

Japan: With respect to Article 23(2) Japan will agree to the deletion of the word "internal" from the text of this paragraph on condition that the following new paragraph be inserted between paragraphs (2) and (3):

> "The provisions of the preceding paragraph shall not be construed as prejudicing the right of innocent passage, recognized by international law, of vessels passing through the territorial waters."

US: How would this draft affect innocent passage?

Japan: If the word "internal" were deleted in paragraph 2 and subparagraph 2(b) of the original draft, without the inclusion of our proposed additional language, the deletion might be construed as giving the receiving state the power to interfere with innocent passage in territorial waters. This we wish to avoid and would refer you to Article 19(1) of the Convention on the Territorial Sea and the Contiguous Zone which also seeks to avoid this interference. The principles of Article 19(1) would apply in interpreting the wording of our proposal.

AOM to Article 23(2)

(Ninth Meeting)

US: With respect to the Agreed Official Minute to Article 23(2), there is no objection to the words "or immigration" and "ports", but

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the word "internal" should be deleted for the reasons cited in the discussion of Article 23(2).

Japan: We will consider the matter further.

(Eleventh Meeting)

Japan: With respect to the Agreed Official Minute to Article 23(2), Japan will agree to the deletion of the word "internal" from this Agreed Official Minute if the United States accepts Japan's proposal for Article 23(2).

Article 24(1) and New Articles on Aircraft and Limitations

(Tenth Meeting)

US: With respect to Article 24(1), the new Article on Aircraft, and the new Article on Limitations, the United States agrees to the Japanese proposals.

Article 26(2)

(Tenth Meeting)

US: With respect to the new paragraph to be included in Article 26(2), the United States agrees to having the Agreed Official Minute transferred to the text of the Convention as proposed.

Protocol 1

(Tenth Meeting)

US: With respect to Protocol 1, the United States cannot agree to the Japanese proposal for the same reasons given for the rejection of the Japanese proposal regarding Article 1.

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(Eleventh Meeting)

Japan: With respect to Protocol 1, Japan agrees to leave this Protocol in its original form as proposed by the United States since Japan agrees to the retention of Article 1. However, we desire clarification concerning the application of the following phrase in Article 1, "..... comprise all areas of land and water subject to the sovereignty or authority of either High Contracting Party...," with respect to US Pacific trust territories. Would these territories be considered as being under the authority of the United States for purposes of this Convention? We may wish to propose an Agreed Official Minute with respect to such clarification.

US: We will attempt to obtain an answer for you on this point.

Protocol 2

(Tenth Meeting)

US: With respect to Protocol 2, this is still under study in Washington.

(Eleventh Meeting)

Japan: With respect to Protocol 2, Japan is awaiting the US position. However, Japan wishes to propose a minor drafting change. We desire to delete the word "native" between "all" and "inhabitants" and replace the two references to "Ryukyuans" by the words "such inhabitants." Because of its unhappy connotation in Japanese translation, we are proposing the elimination of the word "native". It allegedly implies "uncivilized." This point was raised recently by a Socialist member of the Diet when referring to Protocol 14 of the US-Japan Treaty of Friendship, Commerce and Navigation. The Diet member expressed his dislike for the term "native" and the Government therefore desires

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to delete this word from future conventions. Article 3 of the Treaty of Peace with Japan and the recent Treaty of Friendship, Commerce and Navigation between Argentina and Japan set precedents for the use of the term "inhabitants" without "native" in such treaties.

US: For purposes of the history of this Convention, the term "inhabitants" would refer only to Japanese nationals. Is that correct?

Japan: Yes, that is correct.

(Twelfth Meeting)

US: Before we discuss the incorporation of Agreed Official Minutes into the text of the Convention, we would like to examine further your proposal to make certain word changes in Protocol 2. Are we correct in observing that when Protocol 2 was discussed last summer you intended that it apply only to Ryukyuans? It seems to us that the proposal you wish to make now would give a much broader meaning to Protocol 2 and could very likely raise problems.

Japan: Our intention in proposing word changes in Protocol 2 is not to change the substance of the Protocol.

US: As Protocol 2 now stands, the first sentence refers not only to Ryukyuans but to inhabitants of the Bonin Islands, Rosario Island, Volcano Islands, Parece Vela, and Marcus Island whereas the second and third sentences would appear to refer only to Ryukyuans. For purposes of clarity and consistency, it might be useful to consider wording which would have Protocol 2 apply only to Ryukyuans.

Japan: We have given further thought to this matter and would now propose the following wording for Protocol 2:

> "The term 'nationals' in relation to Japan, referred to in subparagraph (3)(b) of Article 2 of the Convention, shall be deemed to include all inhabitants of the area to which this Convention shall not apply in accordance with paragraph 1 of

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this Protocol. However, the right of Japanese consuls to represent such inhabitants in the United States will not extend to those matters for which authorization from the appropriate authorities in such area would be required. The appropriate authorities of the two Governments will consult, whenever necessary, concerning the consular services provided for in this Convention to be rendered in the interests of such inhabitants in the United States."

The following additional considerations are pertinent in regard to our proposed revisions in this Protocol:

1. All three sentences of Protocol 2 should be consistent in their reference to the area to be covered.

2. Such consistency would facilitate Diet consideration of the Convention.

3. Japan considers that from a theoretical point of view people residing permanently in the Bonin, Rosario, Volcano, and Marcus Islands have Japanese nationality.

US: We will transmit your views and proposals to the Department.

Protocol 3

(Tenth Meeting)

US: With respect to Protocol 3, the United States does not understand why Article 13(1) is not referred to in the new Article on Limitations. If this reference were made, it would appear unnecessary to have Protocol 3.

Japan: If Article 13(1) is referred to in the Article on Limitations, it would deny the privileges of this paragraph not only to honorary

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consuls who are permanent resident aliens, as we desire, but also to honorary consuls who are alien businessmen residing in the receiving state in a status other than of a permanent resident. We do not wish, of course, to accord the exemption to honorary consuls who are nationals of the receiving state, unless as provided for in Article 13(1) they are also nationals of the sending state. /It was mentioned in the ensuing discussion that, unlike the US practice, Japanese honorary consuls are more often than not selected from among businessmen of established reputation who are nationals of the receiving state. In the case of the possible appointment of a non-Japanese person as an honorary consul (or its equivalent) by the United States in Japan, such an individual under Japanese immigration procedures would be unlikely to have the status of an alien lawfully admitted for permanent residence and would therefore be exempt under the Japanese concept from taxation on his official salary./

It was our understanding that this Protocol accorded with the policy of the United States. As far as we are concerned, we would have no objection either to placing Protocol 3 at the end of Article 13(1) or making reference to Article 13(1) in the new Article on Limitations and, in either instance, eliminating Protocol 3.

US: We will transmit your views to the Department.

(Eleventh Meeting)

Japan: With respect to Protocol 3, Japan is waiting for the US position.

Protocol 5

(Tenth Meeting)

US: With respect to Protocol 5, the United States agrees to the Japanese proposal.

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Protocol 6

US: With respect to Protocol 6, the United States desires to retain this Protocol because it was designed to effectuate tax exemption for immovable property owned by the sending state and used either for embassy purposes or for residences of embassy officers or employees. While Japan might be able to provide such exemption on the basis of reciprocity or otherwise, property of the Japanese Government in the District of Columbia other than the Embassy and residence of the head of mission would be taxed in the absence of such a provision. The Vienna Convention would also not help, since its tax exemption only applied to the embassy and the residence of the head of mission. The United States strongly desires this paragraph to achieve tax exemption in Japan for the property covered thereby, as well as to be able to provide similar treatment for the Japanese in the District of Columbia.

Japan: We will consult with the Local Autonomy Ministry on this matter.

(Eleventh Meeting)

Japan: With respect to Protocol 6, Japan accepts the US proposal to retain this Protocol.

Disposition of Agreed Official Minutes

(Tenth Meeting)

US: ..... we have been asked to discuss with you the feasibility of incorporating substantive Agreed Official Minutes into the body of the Convention. For some time the United States has been opposed to having Agreed Official Minutes as a part of the Convention since they also would be transmitted to the Senate as a part of the ratification process. We would propose that a joint study be undertaken to

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to determine which Agreed Official Minutes could be incorporated into the body of the Convention.

Japan: We agree to your proposal for such a study.

(Twelfth Meeting)

US: We are now ready to discuss the incorporation of Agreed Official Minutes into the text of the Convention.

/The US and Japanese negotiators then discussed the incorporation of the Agreed Official Minutes into the text of the Convention and the following proposals were agreed upon ad referendum. New or substitute wording proposed is that suggested by the Japanese side./

/The basis for integration of the Agreed Official Minutes as agreed to by the Embassy ad referendum is set forth in Section III of the covering communication above and in the Draft Memorandum of Conversation covering the twelfth negotiating session (Enclosure No. 1)./

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Formal Resumption of US-Japan Consular Convention Negotiations
7th Meeting, February 19, 1962, Foreign Ministry, 2:00 P.M.

Japanese Delegation:

Mr. Ryozo Sunobe	Deputy Director, Treaties Bureau
Mr. Motoo Ogiso	Chief, Legal Section, Treaties Bureau
Mr. Mitsuro Donowaki	Secretary, Legal Section
Mr. Toshitake Katayama	Secretary, Protocol Section
Mrs. Hisami Kurokochi	Secretary, North American Section, American Affairs Bureau
Mr. Kumao Kaneko	Secretary, Legal Section

US delegation:

Mr. Ralph J. Blake	Counselor of Embassy
Mr. Harrison M. Holland	Second Secretary of Embassy

Proceedings:

US: We have now received further detailed instructions from the Department concerning the negotiation of a Consular Convention and are prepared to move ahead with the discussions. It should be pointed out, however, that the Department would still be receptive to the idea of using the short form as a basis for negotiations. We are prepared, however, to continue discussion of unagreed matters still remaining in the long form.

The Department desires the retention of Article 1 as it believes the Japanese proposal for the elimination of this Article would result in showing only where the Convention does not apply and leave to guesswork where it would apply. Article 1 is accepted terminology in many US treaties and its retention is highly desired. If this Article is retained, it would not be necessary to change the wording of Protocol 1. It is noted that Japan stated in the second negotiating session on July 19 that the Article itself was not objectionable.

Japan: One reason for our desire to eliminate this Article is that it does not appear in the US-Iranian treaty of 1955 relating to amity, economic relations, and consular rights. We, therefore, thought it should be eliminated. We note in response to your suggestion, however,

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that the US-UK treaty does have an article dealing specifically with territorial applicability. Does the US take a strong position on the retention of Article 1?

US: The US position has not been presented to the Embassy as being irrevocable but it is the US view that the Article provides for positive rather than negative phraseology which the US considers a highly desirable feature in the Consular Convention.

Japan: We understand your position and will consider the matter further.

US: The United States accepts the GOJ proposal regarding Articles 2(7), 2(9) and 2(10).

With respect to the Agreed Official Minute to Article 2(10), the Department does not accept the Japanese proposal because it believes that definitions in such cases are dangerous and should be left to ad hoc determination as the need arises. As a practical matter, the duties of these positions overlap and, while perhaps necessary for internal Japanese purposes, would be hard for the United States Government to justify for its own personnel.

Japan: What do you mean by ad hoc determination?

US: An example would be the designation of an employee in one or the other of the two consular employee categories, now agreed to in Article 2(10) when and if there is a necessity to do so.

Japan: If the GOJ should decide upon a standard for determining the categories in which an employee belongs, would the Embassy have objections to this determination?

US: The language of the Convention would seem to make such a unilateral determination possible, but the United States might wish to consult with the GOJ in a particular case.

Japan: In arriving at a decision on a matter of this kind, the GOJ would very likely have to obtain views of other Ministries before making its determination.

US: This is illustrative of the desirability of an ad hoc arrangement. It would seem that the terminology of Article 2(10) by itself is sufficient for present purposes of definition and would appear to us to meet in large measure the needs of the GOJ for the categorizing of personnel.

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Japan: If there should be a difference of views between the United States and Japan on this matter, the receiving state could then make the ultimate decision--is that not correct?

US: We believe this is accepted diplomatic practice, subject to reciprocity and the right of representation from the sending state.

Japan: We understand your standpoint and will consider the matter further.

US: The United States agrees to the Japanese proposal regarding Article 2(11).

With respect to Article 3(1) which deals with the establishment and location of consular offices, the United States continues to reject the inclusion of the most-favored-nation principle. As we informed you at the second meeting on July 19, the United States has found it necessary from time to time to order closed all consular establishments of a particular country or to restrict them to particular localities. To avoid possible future misunderstandings and to retain necessary flexibility the United States cannot hereafter agree to such a provision in any new Consular Convention. The most-favored-nation principle is not in the short form text and it is the US intention to employ the provisions of the short form text as a model for its future Consular Conventions.

Japan: We will consider this matter further.

Do Articles 3(2) and (3) need revision?

US: The United States desires the wording of Articles 3(2) and (3) found on the left side of the comparative texts, for the same reasons noted above with respect to Article 3(1).

With respect to Article 5(3) the United States has strong views. We have been instructed to inform you that the presence of such a provision as you propose would produce an undesirable element of uncertainty into the interpretation of the Convention. It would also enable the GOJ to claim certain privileges set forth in older treaties which the United States might not wish to agree to at this time. For these reasons the most-favored-nation principle was eliminated from the short form text as it applied to this particular Article.

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Japan: We feel that if the United States in future consular conventions were to grant more privileges and immunities to a third country than are included in this Convention, Japan would desire the same rights and privileges. We have no intention of claiming the same privileges as contained in older treaties between the United States and third countries but only in future conventions. We would like to see Article 5(3) amended so that a phrase such as "in the future" could be inserted between "accorded" and "to" in Article 5(3).

US: While we wish to reiterate that the United States is firm in its rejection of the most-favored-nation principle as so far discussed in relation to Article 5(3), we shall inquire of the Department concerning the acceptability of your modified proposal. Could you give us a further explanation of why you desire the most-favored-nation principle included in this Consular Convention?

Japan: The United States might give more privileges to a third state in future conventions than provided for in this Convention and Japan would want the same privileges.

US: With respect to the proposal concerning a new paragraph for Article 6(4), you will recall that there was the option of either this new paragraph or an Agreed Official Minute. The United States is agreeable to the new paragraph and as the GOJ has likewise indicated its preference for the new paragraph rather than the Agreed Official Minute, there seems to be no difference of opinion. It is therefore mutually agreed to include the new paragraph as Article 6(4). The United States would like to point out, however, that the object of the new paragraph could also be achieved merely through administrative action.

Japan: The GOJ does not anticipate having to invoke the provisions of this paragraph between the US and Japan but desires its inclusion for precedent purposes in connection with negotiating consular conventions with other states.

US: The US agrees to the GOJ's proposal regarding Article 7(1).

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Formal Resumption of US-Japan Consular Convention Negotiations
8th Meeting, February 26, 1962, Foreign Ministry, 2:00 P.M.

Japanese delegation:

Mr. Motoo Ogiso	Chief, Legal Section, Treaties Bureau
Mr. Mutsuro Donowaki	Secretary, Legal Section
Mr. Toshitake Katayama	Secretary, Protocol Section
Mrs. Hisami Kurokochi	Secretary, North American Section, American Affairs Bureau
Mr. Kumao Kaneko	Secretary, Legal Section

U.S. delegation:

Mr. Ralph J. Blake	Counselor of Embassy
Mr. Harrison M. Holland	Second Secretary of Embassy

Proceedings:

US: With respect to Article 8(3), when this Article was discussed last summer, you proposed that the following words be used in order to remove what the Japanese Government considered was ambiguity in the text: "the archives of the consular office". The United States is of the opinion that the wording contained in the left-hand column of the comparative texts is not ambiguous. It believes that acceptance of the Japanese proposal could mean that the archive documents need not be kept in the consular office, but could be anywhere. Thus, for purposes of evidence in a court proceeding, for example, who would decide whether a document found outside the consular establishment should be classified as an archive document and thereby obtain inviolable status?

Japan: If Article 8(3)(a) and (b) were read together, it would show that such inviolability would exist only if the document is located in a consular office. We will, however, consider the matter further. We believe it to be a minor problem.

US: In Article 8(4) and 9(2), the changes proposed by Japan are acceptable to the United States.

With respect to Article 9(4), the United States would prefer the original wording contained in the left-hand column of the comparative texts. The Department made the observation that there is not a general understanding in many foreign countries of the United States Government's desire to obtain due compensation for seized property. In last summer's

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discussions of this Article, you indicated that the United States' wording was not technically adequate and too specific and you also referred to the possibility of rendering compensation in kind. It would be appreciated if you would explain further your position in this matter.

Japan: There are several reasons for our proposa In the first place, if the US wording were accepted, it would not in fact provide for compensation in kind. Secondly, there could very likely be problems with respect to establishing the exchange rate--would it be based on the bank's selling rate, its buying rate, or on the official rate?

US: It is believed that in international practice the bank's selling rate, not buying rate, establishes the monetary basis for paying compensation if an established official rate of exchange is not controlling.

Japan: There are several other reasons why we wish to have our proposal adopted. The official rate of exchange in Japan may be abolished in the future because of the liberalization of foreign exchange. Also, the treaty of friendship, commerce and navigation between the United States and Japan does not go into as much detail on this matter as does your wording for Article 9(4).

With respect to compensation in kind, this might include the offer of an alternative piece of land or an alternative building for seized property.

US: One method of clarifying the wording of Article 9(4) might be to insert the phrase "or bank" between "official" and "selling rate" in the Article.

Japan: We will have to consult with officials of the Finance Ministry on this matter. Would it be acceptable to delete the second line of Article 9(4) and make it an Agreed Official Minute? The Finance Ministry may consider the retention of the second sentence of Article 9(4) as an undesirable precedent for future international agreements. At any rate, we will be prepared to discuss this matter with you at a later meeting.

US: The Japanese proposal with respect to Article 10(1) is acceptable to the United States.

The Japanese proposal with respect to Article 11(1)(a) is not acceptable to the US. The important difference in our two positions relates to the desire of Japan to withhold from nationals of the receiving state who are employed in consulates of the sending state immunity from

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the jurisdiction of courts of the receiving states for official acts. The United States considers that official acts performed by consular employees who are nationals of the receiving state are acts of the sending state. The immunity in question, therefore, is not a simple personal immunity of the consular employee but rather an immunity attaching to the foreign state as such. The minimum immunity needed in order for a consular employee to be able to exercise his functions is the immunity from jurisdiction granted in respect of official acts. The receiving state may, of course, of its own accord grant the employees in question any other privileges or immunities. The Department has also referred to Article 69 of the International Law Commission's draft convention on consular intercourse and immunities to explain its position. The Consular Convention between the United States and Japan should specifically provide that consular employees who are nationals of the receiving state are exempt from the jurisdiction of courts of the receiving state for official acts.

Japan: From our point of view, there is no difference between our proposal for Article 11(1)(a) and the purport of the International Law Commission's draft. Article 69 means in effect that consular employees who are nationals of the receiving state shall be subject to the jurisdiction of the receiving state but that in exercising such jurisdiction, the receiving state shall use self-restraint.

US: The United States wants to go further than this in order to make it crystal clear that such employees are immune from the jurisdiction of courts of the receiving state for official acts.

Japan: We will study the matter further.

US: With respect to the new paragraph to follow Article 11(2) the Department wishes to delete the words "in virtue of the provisions of preceding paragraphs" since the receiving state exercises its jurisdiction by virtue of powers inherent in it, not pursuant to Article 11(1) and (2). If these words are deleted, the United States could agree to the new paragraph.

Japan: We will study this proposal in connection with Article 11(1). What is your position with respect to our proposal for Article 11(3)?

US: The change you propose for Article 11(3) is similar in nature to those already approved by the United States so there would be no objection to the Japanese proposal.

The Japanese proposal with respect to Article 11(5) is acceptable to the United States.

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US: With respect to Article 12(2), we would appreciate more background information on the logic of not differentiating between direct and indirect taxes for the purpose of this paragraph. Is the Consular Convention a proper place for distinguishing between direct and indirect taxes? Moreover, as this appears to be an internal Japanese Government problem, could not the necessary adjustments be made by Japan without affecting the content and phraseology of the Convention?

Japan: It would not appear very difficult for us to accept the original wording of Article 12(2). However, we will have to discuss it with the Local Autonomy Ministry.

US: The Japanese proposal with respect to Article 13(2)(a) is acceptable to the US.

With respect to the Agreed Official Minute for Article 13(2)(a), it would be helpful to have more information on the purpose of this proposed addition. The US would wish to avoid the interpretation that the Agreed Official Minute could be used to limit the exemptions listed in 13(2)(a).

Japan: The Japanese Government does not intend to limit the exemptions contained in 13(2)(a) by use of the Agreed Official Minute. However, the Local Autonomy Ministry has indicated that it does not want to have the privileges of this Article cover the ownership of more than one car. If a consular officer could register an indefinite number of cars as is theoretically possible by claiming the privileges of Article 13(2)(a), there might be someone who would take advantage of this privilege. There is also the additional problem of having to register cars owned under the provisions of 13(2)(a) with the Foreign Office before taxes can be exempt on such automobiles.

US: The United States concern is not to arrange for special privileges for the ownership of more than one vehicle but simply to insure that the Agreed Official Minute could not be interpreted to limit the rights granted by 13(2)(a). For example, if the Japanese Government did not wish to allow a consular officer to own an automobile under the provisions of 13(2)(a), the officer could be prevented from doing so by refusal of the Foreign Ministry to register his automobile or issue him consular license plates. The US wishes to be satisfied that the provisions of 13(2)(a) could not be abridged by such administrative action.

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Japan: We will attempt to draft a substitute Agreed Official Minute which we hope will be satisfactory to both sides.

US: With respect to Article 13(3), the Japanese Government, in last summer's meetings, expressed the desire not to define the taxes referred to in this Article as either direct or indirect. It is the US view that the wording in the left hand column of the comparative texts does not characterize the nature of these taxes as either direct or indirect and the US would not therefore desire to frame paragraph 3 in the affirmative since it is not the purpose of a consular convention to say what taxes may be imposed but rather to allow local law to define such taxes and merely provide exemptions therefrom in the Convention. It would appear to us that this is another example of an internal Japanese Government problem which could better be adjusted outside rather than inside the Convention. From the long term point of view, both sides would probably benefit from a statement specifying exemptions from taxes rather than a statement listing taxes to be imposed since it is not possible to know in advance what future circumstances might exist requiring the imposition of a particular tax or taxes not contemplated at the time the Consular Convention is concluded.

Japan: One reason for our desire to have our proposal accepted is that the Local Autonomy Ministry is worried about the application of the definition of direct and indirect taxes to future consular conventions and to the Vienna Convention which is presently under study by the Japanese Government. We would further wish to point out that in Article 34 of the Vienna Convention there is a reference to indirect taxes. However, we will discuss the matter with the Local Autonomy Ministry and give you our views at a later date.

US: With respect to Article 13(3)(d), the US will give its decision later.

The Japanese proposal with respect to Article 13(4)(a) is acceptable to the US.

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Formal Resumption of US-Japan Consular Convention Negotiations
9th Meeting, March 5, 1962, Foreign Ministry, 2:00 P.M.

Japanese delegation:

Mr. Motoo Ogiso	Chief, Legal Section, Treaties Bureau
Mr. Mitsuro Donowaki	Secretary, Legal Section
Mr. Toshitake Katayama	Secretary, Protocol Section
Mrs. Hisami Kurokochi	Secretary, North American Section, American Affairs Bureau
Mr. Kumao Kaneko	Secretary, Legal Section

US delegation:

Mr. Ralph J. Blake	Counselor of Embassy
Mr. Harrison M. Holland	Second Secretary of Embassy

Proceedings:

US: With respect to the diesel oil delivery taxreferred to in Article 13(3)(d), the Japanese proposal is acceptable to the US.

With regard to Article 14(2), the US accepts the proposal to limit its application to "a consular officer" but would prefer the wording in the left hand column of the comparative texts with respect to the Japanese desire to include "forming part of his household" as a definition of family members to receive the benefits of this paragraph. The US considers the proposed Japanese wording to be far from what is believed would be sufficient clarity. For example, does the term "forming part of his household" include adult unmarried daughters or parents? It is the US view that those persons not residing regularly with the consular officer or not necessarily present for his welfare or comfort should not be entitled to exemptions from custom duties.

Japan: The Japanese draft states that such exemptions would be accorded members of the consular officer's family "forming part of his household" and we believe that this wording is more definitive than the text of the US draft.

US: The US desires to avoid the interpretation that people not regularly residing with the officer can have the privileges of this Article.

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Japan: For example, the Japanese draft would permit a daughter or son not residing with the parents, but elsewhere in the receiving state (such as at a boarding school) and supported by them, to receive the benefits of this Article but would withhold such benefits from a son or daughter, as well as a parent, residing with the consular officer but working and receiving a salary substantially sufficient for self-support.

US: We appear to be in substantial agreement on this. However the US does not want to go too far in extending these privileges.

Japan: We used the wording of Article 37 of the Vienna Convention as a basis for our proposal and inasmuch as it is quite possible that the Vienna Convention and this Consular Convention will be submitted to the same session of the Diet, we would wish to avoid explaining differences of wording. If the US has misgivings about the phraseology, however, we would be prepared to draft an Agreed Official Minute for purposes of clarification. We will discuss this matter further at a later session.

US: The new paragraph proposed for Article 14 is agreeable to the US.

With respect to Article 15(4), the concern of the US rests with the interpretation of the word "administrative". The Japanese wording might be construed as permitting authorities who are not "administrative" to prevent access to the consular officer. In addition, since it is believed usual in consular conventions to regulate by granting rights and not by imposing restraints, we are of the view that the wording in the left hand column of the comparative texts would be more desirable.

Japan: This appears to us to be a drafting change and we will consider the matter further.

US: With respect to Article 16(1), the word "undue" was omitted from the US text to alleviate problems of definition, since otherwise in any particular circumstance there could be a delay but it could be said not to be undue. It is believed that the Japanese wording would make the right of immediate visitation more prone to controversy. Definitions, as we have noted elsewhere, can sometimes be dangerous. We would not wish to have delay sanctioned by the wording of this Convention.

Japan: There seems to be some misunderstanding about where "undue" should be placed in the text. Rather than placing it in the second sentence of Article 16(1), it should correctly be placed in the third sentence of Article 16(1) between the same words "without" and "delay", but in reference to a "communication" and not to a "visit".

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US: If "undue" is placed in the third rather than the second sentence of this Article, it may substantially remove the objections voiced by the Department. We shall inform the Department of this correction.

Japan: The implicit purpose of using the word "undue" is to prevent a detainee from hiding or destroying evidence by forwarding messages through his consul asking for the concealment or obliteration of material facts relating to the cause for his detention. Under the Japanese view, the authorities of the receiving state should be permitted to delay the forwarding of such messages until countermeasures necessary to protect all existing evidence can be taken in accordance with prison laws and regulations. We will, however, look into the matter further and discuss it at a later time.

US: With respect to Article 17(1)(e), there is no US objection to the substance of the Japanese proposal. However, to ensure that the phrase "any person in the receiving state in accordance with....." following (iii) modifies (i) and (ii) as well, it should be set off as follows:

(e) (i) serve judicial documents, on behalf of the courts of the sending state, upon, or

(ii) take evidence, on behalf of the courts of the sending state, voluntarily given by, or

(iii) administer oaths to

any person in the receiving state in accordance with the laws of the sending state and in a manner not inconsistent with the laws of the receiving state.

Japan: This is agreeable.

US: In last summer's negotiating sessions, Japan, in referring to Article 17, asked for an explanation concerning the "special arrangements" provision of Article 17(1)(g) of the US-UK Consular Convention. The Department has instructed the Embassy to advise the Japanese Government that no such arrangements have ever been made and since the provision of such arrangement was never implemented it was not felt necessary to propose it in this Consular Convention.

Are we correct in assuming that Japanese consular officers now serve judicial documents on United States as well as Japanese nationals in the U.S.?

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Japan: That is correct.

US: We would appreciate further background information on this matter.

Japan: Since receipt by the Ministry of the memorandum dated June 8, 1958 from Mr. Baldwin of the Embassy, Japanese consuls in the US have been serving judicial documents on US as well as Japanese nationals.

US: What would be the attitude of Japan to a proposal giving duly registered and designated lawyers in Japan the authority to serve US legal process? Under US laws, US consular officers cannot normally serve such documents and therefore it would seem to be desirable to develop a procedure for rendering such service.

Japan: Our intention with respect to Article 17(1)(e) was to exclude lawyers duly registered to practise in Japan from serving judicial documents.

US: Article 17(1)(e) would have no practical effect from the US point of view as USconsular officers in Japan cannot serve legal documents in the great majority of cases.

Japan: The Supreme Court and the Ministry of Justice object to lawyers serving documents in Japan but we will endeavor to obtain confirmation of this position. Do you propose to cover this matter in the Convention?

US: Not necessarily.

With respect to the Agreed Official Minute to Article 17(1)(e) the US would appreciate a further explanation of the need for such an Agreed Official Minute.

Japan: The purpose of proposing this Agreed Official Minute was to obtain for the Ministry of Justice confirmation in writing concerning the matters covered in the Agreed Official Minute. You will note, for example, that the Japanese judge referred to in the Agreed Official Minute has the same power as a Japanese court but does not himself represent a court per se. As for the reference to US commissioners, this was intended to reflect a sort of reciprocity.

US: With respect to Article 17(4)(b) the US has agreed to the Japanese proposal.

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With respect to paragraph 1 of the New Estate Article, the US believes that under the Japanese proposal the obligation to notify is greater in that it would have to be made for any deceased person and not merely for a deceased person without any known heir or testamentary executor within the receiving state. The US believes that the Japanese proposal goes too far, since if the deceased person has a local executor or near relative, that person should do the necessary notifying. Would not your proposal place too great an obligation on the authorities of the receiving state? It is our conclusion that the US wording would require less work by consular officers.

Japan: Under the US draft, authorities of the receiving state must confirm that there is no next-of-kin in the receiving state and this was considered an unnecessary chore. The Japanese draft would not require authorities of the receiving state to make such a confirmation. Furthermore, the US draft would call upon the authorities of the receiving state to make the required notification as promptly as possible. The Japanese draft does not make this obligation so urgent. However, we do not have strong feelings on this matter so we will study your proposal and be ready to discuss the Article at a later meeting.

US: During last summer's sessions you requested an explanation of the difference between 2(a) and 2(b) in the Estates Article. We are now prepared to give you such an explanation and also to inform you of a further necessary technical change required in the New Estates Article.

Japan: We would prefer that you defer discussion of 2(a) and (b) and the additional technical change required until the next meeting when we will have an official of the Ministry of Justice present.

With respect to 23(2), the US would prefer not to use modifiers before the word "waters" since both the terms "territorial waters" and "internal waters" have definite meanings ascribed to them in other contexts and both differ in scope. It is therefore proposed that the word "water" not be modified by either term, much as is done in Article 7 of the short form. The other two changes proposed by Japan for Article 23(2)(b) are acceptable to the US.

Japan: We may have to ask clarification from the US if the word "waters" is used without modifiers as it would not be clear whether you mean internal, territorial, or both. In order to accept the US proposal, it must be clear whether "waters" means "internal" or "territorial" or both. We will need such clarification when the Convention is submitted to the Diet for ratification. Furthermore,

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we do not wish to deal in this Convention with questions arising with respect to "territorial waters", which should properly be dealt with pursuant to the Convention on the Territorial Sea and the Contiguous Zone signed at Geneva. We will, however, study this matter further and may request that you obtain clarification from the Department.

US: With respect to the Agreed Official Minute to Article 23(2), there is no objection to the words "or immigration" and "ports", but the word "internal" should be deleted for reasons cited in the discussion of Article 23(2).

Japan: We will consider the matter further.

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Formal Resumption of US-Japan Consular Convention Negotiations
10th Meeting, March 9, 1962, Foreign Ministry, 2:00 P.M.

Japanese delegation:

For the Ministry of Foreign Affairs:

Mr. Motoo Ogiso	Chief, Legal Section, Treaties Bureau
Mr. Mitsuro Donowaki	Secretary, Legal Section, Treaties Bureau
Mr. Toshitake Katayama	Secretary, Protocol Section
Mrs. Hisami Kurokochi	Secretary, North American Section, American Affairs Bureau
Mr. Kumao Kaneko	Secretary, Legal Section

For the Ministry of Justice:

Mr. Jiro Muraoka	Public Prosecutor, Civil Affairs Bureau

US delegation:

Mr. Ralph J. Blake	Counselor of Embassy
Mr. Harrison M. Holland	Second Secretary of Embassy

Proceedings:

US: At the fifth negotiating session on August 2, 1961, you asked about the difference between taking provisional custody of an estate and administering an estate as covered by paragraphs 2(a) and 2(b) of the Property and Estates Article. The Department has instructed us to inform you that 2(a) relates only to the preservation of personal assets while 2(b) is broader and encompasses real property. By the terms of the Department's instructions, real property would not be included under personal assets. The US believes that administration of an estate of a national of the sending state should not be given to a consular officer of the sending state when such nationals may have resided in the receiving state for many years and acquired considerable assets, including real property.

Japan: Does paragraph 2(a) exclude real property?

US: Yes it does.

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Japan: With respect to the application of paragraph 2(a) and 2(b), is it necessary that the deceased die in the receiving state or could he die outside the receiving state?

US: If the deceased has property in the receiving state and has there no heir or testamentary executor, irrespective of where he dies, the provisions of paragraph 2(a) and 2(b) would apply.

With respect to the required technical change, the US desires to delete the words "or upon the petition of heirs having the majority interest in such estate." This phrase was originally made a part of the recent revision of the Estates Article to meet the objection that while a consular officer might have himself named as administrator, the principal heirs may have some other person in mind. On further reflection, however, the phrase was considered to be so uncertain in its wording that unnecessary litigation would probably result. Such wording might give rise to prolonged lawsuits between disputing heirs and this could delay settlement of an estate. The proposed deletion constitutes no change of real substance in paragraph 2(b) since the immediately preceding clause still provides that a consular officer shall relinquish administration of an estate upon the appointment of another administrator. This deletion is essential for US acceptance of the Convention.

Japan: We probably will be able to agree to your proposal but will give our final answer later.

US: With respect to Article 24(1), the new Article on Aircraft, and the new Article on Limitations, the US agrees to the Japanese proposals.

With respect to the new paragraph to be included in Article 26(2), the US agrees to having the Agreed Official Minute transferred to the text of the Convention as proposed. In this connection, we have been asked to discuss with you the feasibility of incorporating substantive Agreed Official Minutes into the body of the Convention. For some time the US has been opposed to having Agreed Official Minutes as a part of the Convention since they also would be transmitted to the Senate as a part of the ratification process. We would propose that a joint study be undertaken to determine which Agreed Official Minutes could be incorporated into the body of the Convention.

Japan: We agree to your proposal for such a study.

US: With respect to an Agreed Official Minute to Article 11(1)(a), the US can agree to your proposal provided the Agreed Official Minute becomes a part of Article 11.

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Japan: We would propose the following rephrased wording to follow the last sentence of Article 11(1)(a): "The consent of the sending state shall be notified to the receiving state in writing through diplomatic channels." If this wording is added to Article 11(1)(a), the Agreed Official Minute can be eliminated.

US: We appear to be in agreement on this change.

With respect to Protocol 1, the US cannot agree to the Japanese proposal for the same reasons given for the rejection of the Japanese proposal regarding Article 1. With respect to Protocol 2, this is still under study in Washington.

With respect to Protocol 3, the US does not understand why Article 13(1) is not referred to in the new Article on Limitations. If this reference were made, it would appear unnecessary to have Protocol 3.

Japan: If Article 13(1) is referred to in the Article on Limitations, it would deny the privileges of this paragraph not only to honorary consuls who are permanent resident aliens, as we desire, but also to honorary consuls who are alien businessmen residing in the receiving state in a status other than of a permanent resident. We do not wish, of course, to accord the exemption to honorary consuls who are nationals of the receiving state, unless as provided for in Article 13(1) they are also nationals of the sending state. /It was mentioned in the ensuing discussion that, unlike the US practice, Japanese honorary consuls are more often than not selected from among businessmen of established reputation who are nationals of the receiving state. In the case of the possible appointment of a non-Japanese person as an honorary consul (or its equivalent) by the US in Japan, such an individual under Japanese immigration procedures would be unlikely to have the status of an alien lawfully admitted for permanent residence and would therefore be exempt under the Japanese concept from taxation on his official salary./

It was our understanding that this Protocol accorded with the policy of the US. As far as we are concerned, we would have no objection either to placing Protocol 3 at the end of Article 13(1) or making reference to Article 13(1) in the new Article on Limitations and, in either instance, eliminating Protocol 3.

US: We will transmit your views to the Department.

With respect to Protocol 5, the US agrees to the Japanese proposal.

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With respect to Protocol 6, the US desires to retain this Protocol because it was designed to effectuate tax exemption for immovable property owned by the sending state and used either for embassy purposes or for residences of embassy officers or employees. While Japan might be able to provide such exemption on the basis of reciprocity or otherwise, property of the Japanese Government in the District of Columbia other than the Embassy and residence of the head of mission would be taxed in the absence of such a provision. The Vienna Convention would also not help, since its tax exemption only applied to the embassy and the residence of the head of mission. The US strongly desires this paragraph to achieve tax exemption in Japan for the property covered thereby, as well as to be able to provide similar treatment for the Japanese in the District of Columbia.

Japan: We will consult with the Local Autonomy Ministry on this matter.

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Formal Resumption of US-Japan Consular Convention Negotiations
11th Meeting, April 10, 1962, Foreign Ministry, 2:00 P.M.

Japanese delegation:

Mr. Motoo Ogiso	Chief, Legal Section, Treaties Bureau
Mr. Mitsuro Donowaki	Secretary, Legal Section
Mrs. Hisami Kurokochi	Secretary, North American Section, American Affairs Bureau
Mr. Kumao Kaneko	Secretary, Legal Section
Mr. Hideki Masaki	Deputy Chief, Protocol Section

US delegation:

Mr. Ralph J. Blake	Counselor of Embassy
Mr. Harrison M. Holland	Second Secretary of Embassy

Proceedings:

Japan: Japan agrees to the retention of Article 1, to the deletion of the Agreed Official Minute to Article 2(10), and to the wording for Article 3 as proposed by the US. Japan will await the US response to its proposal for the inclusion in Article 5(3) of the phrase "in the future" between the words "accorded" and "to" in this paragraph.

Japan withdraws its proposal for a word change in Article 8(3)(a). However, we would like to suggest that the present subparagraph 3(a) become 3(b) and 3(b) become 3(a). This switch in the order of subparagraphs would avoid the interpretation that the term archives might refer to archives which are not those of a consular office. We would further wish to propose in the existing Article 8(3)(b) that the term "consular officers and employees" be substituted for "such officer".

With respect to Article 9(4), Japan wishes to propose the following sentence as an alternative to the second sentence of this paragraph: "Compensation shall be payable in a form readily convertible into the currency of and transferable to the sending state, not later than three months from the date on which the amount of compensation has been finally fixed." Japan is not in a position to promise that compensation for seized property will be determined on the basis of the exchange rate prevailing at the time of seizure. Rather it would prefer to make such a determination on the basis of the exchange rate at the time of remittance.

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US: In view of this position, would Japan give consideration to a possible depreciation factor in determining compensation?

Japan: In such a case, Japan may give due consideration to the special situation involving depreciation on a case by case basis. The principal reason for our proposal is that we could foresee that bank selling rates could differ with respect to (1) the date the property is seized, (2) the date the amount of compensation is fixed, and (3) the date the compensation is remitted. The Finance Ministry would agree to pay at the bank's selling rate at the time of remittance.

US: We will transmit your views to the Department.

Japan: Article 11(1) is still being considered by the Japanese side.

With respect to the new paragraph to follow Article 11(2), Japan agrees to the deletion of the words "in virtue of the provisions of preceding paragraphs" from the text of this new paragraph.

Japan accepts the original wording of the preambles of Articles 12(2) and 13(4) /new 13(3)/, deletion of the word "career" from the preamble of Article 12(2) being already agreed to.

We wish to draw your attention to a minor change required in Article 13(3)(d) which appears in the right hand column of the US-Japan comparative texts. The term "amusement tax" was changed last year to "hotel and restaurant tax" so this subparagraph should now read, "taxes on use of amusement facilities, the hotel and restaurant tax, the spa tax, the traveling tax, taxes on electricity and gas, and the diesel oil tax." However, this tax is the same amusement tax which was defined as applying to hotels, restaurants and tea houses when it was first discussed at the July 27, 1953 meeting.

With respect to the Agreed Official Minute to Article 13(2)(a), Japan proposes that this Agreed Official Minute be incorporated into the text of the Article by adding the following sentence between the first and second sentences of this subparagraph:

> "The number of vehicles entitled to such exemption shall be decided in accordance with the laws and regulations of the receiving state, provided that such consular officer or employee shall be entitled to the exemption with respect to at least one vehicle."

With respect to Article 14(2), we are awaiting the US position. As explained at the ninth meeting held on March 5, 1962, we still wish to amend the definition of "family" so it will conform to the wording used in the Vienna Convention on diplomatic relations. We also anticipate that the 1963 Vienna Conference on consular affairs will adopt the same wording as we propose.

With respect to Article 15(4), Japan accepts the original wording of this paragraph.

With respect to Article 16(1), we are awaiting the US position.

US: Would the wording of Article 16(1) permit a consular officer to visit a detained national of the sending state as many times as he chose?

Japan: In principle, a consular officer would be allowed to visit a detained national of the sending state as many times as he wished provided that these visits would not interfere unduly with the investigation of a case. It is interesting to note that in the International Law Commission draft, which will serve as a basis for discussions at the multilateral convention on consular affairs, the phrase "without undue delay" is used in Article 36(1)(b).

With respect to the Agreed Official Minute to Article 17(1)(e), Japan is awaiting the US position.

With respect to the Estates Article (1), Japan accepts the text of this paragraph as proposed by the US and further agrees to the deletion of the last two lines of (2)(b) of the Estates Article which read: "or upon the petition of heirs having the majority interest in such estate;".

With respect to Article 23(2) Japan will agree to the deletion of the word "internal" from the text of this paragraph on condition that the following new paragraph be inserted between paragraphs (2) and (3):

> "The provisions of the preceding paragraph shall not be construed as prejudicing the right of innocent passage, recognized by international law, of vessels passing through the territorial waters."

US: How would this draft affect innocent passage?

Japan: If the word "internal" were deleted in paragraph 2 and sub-paragraph 2(b) of the original draft, without the inclusion of our

proposed additional language, the deletion might be construed as giving the receiving state the power to interfere with innocent passage in territorial waters. This we wish to avoid and would refer you to Article 19(1) of the Convention on the Territorial Sea and the Contiguous Zone which also seeks to avoid this interference. The principles of Article 19(1) would apply in interpreting the wording of our proposal.

With respect to the Agreed Official Minute to Article 23(2), Japan will agree to the deletion of the word "internal" from this Agreed Official Minute if the US accepts Japan's proposal for Article 23(2).

With respect to Protocol 1, Japan agrees to leave this Protocol in its original form as proposed by the US since Japan agrees to the retention of Article 1. However, we desire clarification concerning the application of the following phrase in Article 1, ".....comprise all areas of land and water subject to the sovereignty or authority of either High Contracting Party.::.::," with respect to US Pacific trust territories. Would these territories be considered as being under the authority of the US for purposes of this Convention? We may wish to propose an Agreed Official Minute with respect to such clarification.

US: We will attempt to obtain an answer for you on this point.

Japan: With respect to Protocol 2, Japan is awaiting the US position. However, Japan wishes to propose a minor drafting change. We desire to delete the word "native" between "all" and "inhabitants" and replace the two references to "Ryukyuans" by the words "such inhabitants." Because of its unhappy connotation in Japanese translation, we are proposing the elimination of the word "native". It allegedly implies "uncivilized." This point was raised recently by a Socialist member of the Diet when referring to Protocol 14 of the US-Japan Treaty of Friendship, Commerce and Navigation. The Diet member expressed his dislike for the term "native" and the Government therefore desires to delete this word from future conventions. Article 3 of the Treaty of Peace with Japan and the recent Treaty of Friendship, Commerce and Navigation between Argentina and Japan set precedents for the use of the term "inhabitants" without "native" in such treaties.

US: For purposes of the history of this Convention, the term "inhabitants" would refer only to Japanese nationals. Is that correct?

Japan: Yes, that is correct.

With respect to Protocol 3, Japan is waiting for the US position.

With respect to Protocol 6, Japan accepts the US proposal to retain this Protocol.

Formal Resumption of US-Japan Consular Convention Negotiations
12th Meeting, April 11, 1962, Foreign Ministry, 3:00 P.M.

Japanese delegation:

Mr. Motoo Ogiso	Chief, Legal Section, Treaties Bureau
Mr. Mitsuro Donowaki	Secretary, Legal Section
Mrs. Hisami Kurokochi	Secretary, North American Section, American Affairs Bureau
Mr. Kumao Kaneko	Secretary, Legal Section

US delegation:

Mr. Ralph J. Blake	Counselor of Embassy
Mr. Harrison M. Holland	Second Secretary of Embassy

Proceedings:

US: Before we discuss the incorporation of Agreed Official Minutes into the text of the Convention, we would like to examine further your proposal to make certain word changes in Protocol 2. Are we correct in observing that when Protocol 2 was discussed last summer you intended that it apply only to Ryukyuans? It seems to us that the proposal you wish to make now would give a much broader meaning to Protocol 2 and could very likely raise problems.

Japan: Our intention in proposing word changes in Protocol 2 is not to change the substance of the Protocol.

US: As Protocol 2 now stands, the first sentence refers not only to Ryukyuans but to inhabitants of the Bonin Islands, Rosario Island, Volcano Islands, Parece Vela, and Marcus Island whereas the second and third sentences would appear to refer only to Ryukyuans. For purposes of clarity and consistency, it might be useful to consider wording which would have Protocol 2 apply only to Ryukyuans.

Japan: We have given further thought to this matter and would now propose the following wording for Protocol 2: "The term 'nationals' in relation to Japan, referred to in subparagraph (3)(b) of Article 2 of the Convention shall be deemed to include all inhabitants of the area to which this Convention shall not apply in accordance with paragraph 1 of this Protocol. However, the right of Japanese consuls to represent such inhabitants in the United States will not extend to those matters for which authorization from the appropriate authorities in such area would be required. The appropriate authorities of the two Governments will consult, whenever necessary, concerning the consular services provided for in this Convention to be rendered in the interests of such inhabitants in the United States."

The following additional considerations are permitted in regard to our proposed revisions in this Protocol:

1. All three sentences of Protocol 2 should be consistent in their reference to the area to be covered.

2. Such consistency would facilitate Diet consideration of the Convention.

3. Japan considers that from a theoretical point of view people residing permanently in the Bonin, Rosario, Volcano, and Marcus Islands have Japanese nationality.

US: We will transmit your views and proposals to the Department.

We are now ready to discuss the incorporation of Agreed Official Minutes into the text of the Convention.

/The US and Japanese negotiators then discussed the incorporation of the Agreed Official Minutes into the text of the Convention and the following proposals were agreed upon ad referendum. New or substitute wording proposed is that suggested by the Japanese side./

1. Agreed Official Minutes to Articles 2(10), 13(3), and 14(3) would be deleted as previously agreed.

2. Agreed Official Minute to Article 2(11) would be deleted because the US has already agreed to the deletion of Article 2(11) itself.

3. Agreed Official Minute to Article 6 would become, in substance, new paragraph 4 in Article 6.

4. Agreed Official Minute to Articles 7 and 12 would become new Protocol 3 with the remaining Protocols to be renumbered accordingly.

5. Agreed Official Minute to Article 10(1) would become a part of the Convention by adding the following as the final two sentences in Article 10(1):

> "In sending or receiving consular pouches through postal channels, a consular officer shall be subject to the postal laws and regulations of the receiving state. Nothing contained in the immediately preceding sentence, however, shall be deemed to affect the provisions of this Article."

6. Agreed Official Minute to Article 11(1)(a) would become a part of the Convention by adding the following sentence to Article 11(1)(a):

> "The consent of the sending state shall be notified to the receiving state in writing through diplomatic channels."

7. Agreed Official Minute to Article 13(2)(a) would become a part of the Convention by adding the following sentance between the first and second sentances in Article 13(2)(a):

> "The number of vehicles entitled to such exemption shall be decided in accordance with the laws and regulations of the receiving state, provided that such consular officer or employee shall be entitled to the exemption with respect to at least one vehicle."

8. Agreed Official Minute to Articles 14 and 17 would become a part of the Convention by adding the following sentence as a new subparagraph (f) in Article 14(3):

> "(f) Paragraph (1) of this Article and paragraph (5) of Article 17 shall not be construed to prejudice the laws and regulations of the receiving state concerning the consulate's importation of cinema films excluding films for academic or cultural use, and films which are in fact documentary or newsreels, imported exclusively for official use."

9. Agreed Official Minute to Article 17(1)(e) would become Protocol 6 or 7 of the Convention, as appropriate, and with the insertion of "pursuant to Article 17(1)(e)" between the words "consuls" and "shall" in the first sentence.

10. Agreed Official Minute to Article 23(2) would become a part of the Convention by adding the following sentence in Article 23(2)(b):

> "Crimes or offenses against the laws of the receiving state regarding public health, customs or immigration committed on board a vessel in the ports or internal waters of that state shall be deemed to be included in the crimes or offenses involving the tranquility of the port."

The US side noted that the word "internal" could be deleted from this Agreed Official Minute if the Department agreed to the Japanese proposal made at the 11th meeting on April 10, 1962.

11. Agreed Official Minute to the Consular Convention would become a new appropriately numbered paragraph between the present Article 26(2) and (3).

12. Agreed Official Minute to Protocol 1 and 2 would be deleted as previously agreed.

Formal Resumption of US-Japan Consular Convention Negotiations
13th Meeting, April 17, 1962, Foreign Ministry, 3:00 P.M.

Japanese delegation:

Mr. Motoo Ogiso	Chief, Legal Section, Treaties Bureau
Mr. Mitsuro Donowaki	Secretary, Legal Section
Mr. Takeo Iguchi	Secretary, Treaties Section, Treaties Bureau
Mrs. Hisami Kurokochi	Secretary, North American Section, American Affairs Bureau
Mr. Kumao Kaneko	Secretary, Legal Section, Treaties Bureau

American delegation:

Mr. Ralph J. Blake	Counselor of Embassy
Mr. Harrison M. Holland	Second Secretary of Embassy

Proceedings:

US: We have received instructions from the Department concerning Article 5(3) and have been directed to inform you that the US cannot agree to the Japanese proposal for most-favored-nation (MFN) treatment with respect to future consular conventions. It desires that paragraph 5(3) be deleted from the Convention as earlier proposed by the US. The following reasons are set forth for this position:

(1) In as much as it is highly unlikely that more privileges than are now provided for in the Estates Article will be approved in other consular conventions which the US might negotiate, MFN treatment would have little substantive value. Other consular functions, such as, for example, notarials and shipping, are of little controversy and are generally uniform and routine. It is unlikely that there will be any significant change in these matters in the future.

(2) The upcoming 1963 Vienna Convention on consular intercourse and immunities will very likely set a pattern for future consular conventions. It would appear unlikely that the US draft of the proposed Consular Convention with Japan, as well as any other future US convention, and the 1963 agreements would differ substantially in content.

(3) A consular convention not only should stand on its own feet and not have to be buttressed by the provisions of other conventions, but should not be encumbered by the factor of vagueness as already discussed at earlier meetings.

Japan: Are we correct in understanding that the US changed its policy in 1957 from including to excluding MFN treatment provisions in consular conventions?

US: As far as we are aware, there have been no post-war precedents for the inclusion of MFN treatment provisions in a US consular convention since the US/UK, US/Ireland, or US/Costa Rica conventions which were negotiated before the US changed its basic policy with respect to MFN treatment which we believe occurred around 1957.

Japan: We understand your position and will give our answer later.

When we were discussing Article 3(1) last summer, on July 19, 1961, we asked whether the wording of the second sentence of Article 3(1) would provide for the establishment of branch offices of a consulate general or consulate and we believe you replied that the wording of this sentence would not appear to exclude the establishment of such branch offices. We would like a clearer statement from you on this point.

US: What do you mean by branch offices?

Japan: In our Foreign Office Establishment Law there is a provision for the establishment of a branch office of a consulate general or consulate. We can foresee the possible establishment of a branch of the New York Consulate General in Boston with a Vice Consul in charge. Theoretically, it would be possible to designate a Boston branch as a full Consulate but from a budgetary point of viewit might be more difficult to accomplish.

US: We forwarded the exchange of views to which you have just referred to the Department last summer and the Department did not indicate its objection to the Embassy's view that the second sentence of Article 3(1) would not exclude the establishment of a branch office of a Consulate General or a Consulate.

Japan: We would then like to amend the same second sentence of Article 3(1) to read as follows:

> "The sending state may in its discretion designate a consular office as a consulate general, consulate, their branch offices, vice consulate, consular agency, honcrary consulate general, or honorary consulate."

We recall that the initial reference to "honorary consul" was made in the first negotiating session on April 17, 1953 at which time the US side stated in effect that honorary consulate general or honorary consulate would be covered by this convention.

US: We will forward your new proposal to the Department.

Formal Resumption of US-Japan Consular Convention Negotiations
14th Meeting, April 27, 1962, Foreign Ministry, 2:00 P.M.

Japanese delegation:

Mr. Motoo Ogiso	Chief, Legal Section, Treaties Bureau
Mr. Mitsuro Donowaki	Secretary, Legal Section
Mr. Keishiro Matsumura	Secretary, North American Section, American Affairs Bureau
Mr. Kumao Kaneko	Secretary, Legal Section, Treaties Bureau

American delegation:

Mr. Ralph J. Blake	Counselor of Embassy
Mr. Harrison M. Holland	Second Secretary of Embassy

Proceedings:

Japan: Today we propose to discuss Articles 5(3) and 11(1)(a).

With respect to Article 5(3), the Japanese side has noted the explanation given by the US delegation to the effect that any other future US consular conventions would probably not differ substantially from this draft Japan-US convention and agrees to its deletion from the Convention.

With respect to Article 11(1)(a), Japan is not yet in a position to accept the US draft for this subparagraph as it now stands. Acceptance of the US position might result in according greater privileges and immunities to employees of a consulate who are nationals of the receiving state than to employees of a diplomatic mission who are nationals of the receiving state. As a compromise we prepared two alternative proposals. We would propose that without altering the wording of subparagraph 11(1)(a) as it was previously suggested by Japan, the following new sentence be added in the same subparagraph:

> "However, it is the common intention of the High Contracting Parties that the administrative authorities of the receiving state should not institute prosecutions against a consular employee who is a national of the receiving state in respect of such acts unless they are committed through willful misconduct or gross negligence."

Alternatively, we would propose that the following new sentence be added after the original US draft of this subparagraph:

"However, the courts of the receiving state shall not be precluded from exercising jurisdiction over a consular employee who is a national of the receiving state in respect of crimes committed through willful misconduct or gross negligence."

US: The US would be interested in any elaboration you may wish to make on the terms "willful misconduct" and "gross negligence".

Japan: For example, if a Japanese driver of an American Consulate while on official business were to go through a red light, hit a pedestrian, and leave the scene of the accident without offering appropriate assistance to the victim, he would be considered as having committed an act through willful misconduct or gross negligence. Furthermore, under the provisions of the Vienna Convention on Diplomatic Relations (Article 38, paragraph 2), a corresponding employee of a diplomatic mission would enjoy privileges and immunities only to the extent admitted by the receiving state. It might be observed, however, that there has never been a case to our knowledge in which a Japanese employee of a consulate or a diplomatic mission in Japan has been prosecuted for having committed crimes due to gross negligence or willful misconduct.

US: Our concern does not relate solely to so-called hit and run crimes, as the US would be just as concerned as the Japanese authorities about a local Japanese employee who was involved in such a crime and would certainly not condone the action. Our principal concern is to insure that local Japanese employees who carry out official acts on instructions from a consular officer are immune from Japanese jurisdiction.

Japan: If a Japanese local employee of a consulate were to commit a crime while carrying out official acts under instructions, and yet be unaware that he was breaking a law, he would not be considered as having committed a crime due to willful misconduct or gross negligence and would probably not be prosecuted. However, if in carrying out his assignment he were knowingly to break the law, he would be considered as having committed willful misconduct. For example, to bribe a government official for the purpose of obtaining confidential information would be regarded as willful misconduct. We wish to make it clear that Japan's principal concern here is to have jurisdiction over a Japanese local employee of an American consular office who, for example, while driving a car, kills or seriously injures a pedestrian through gross negligence or willful misconduct. If we are not to experience difficulties in the ratification process, we must be able to assure Diet members that such an employee would not be immune from Japanese jurisdiction.

US: At the beginning of this discussion, you stated that a reason for desiring the adoption of your proposal was that you did not desire to accord local employees of a consular office more privileges and immunities than local employess of a diplomatic mission. Is that your principal concern?

Japan: From a theoretical point of view, yes. From the practical point of view, however, our concern is mostly with drivers and our proposal would only be applicable to those employees who commit crimes with willful disregard of the laws of the receiving state. If the US side believes that our proposal is not sufficiently clear in its explanation of "willful misconduct" and "gross negligence", we would be prepared to consider some minor drafting changes.

US: We will inform the Department of your proposals.

During our discussion of Article 17(1)(e) at the ninth meeting on March 5, we believe you stated that the Supreme Court Secretariat and the Justice Ministry objected to the service of process by duly registered lawyers in Japan, but that you would attempt to confirm this position. Have you been able to obtain such confirmation?

Japan: There continues to be objection to this practice.

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MEMORANDUM OF CONVERSATION

Tokyo,
March 10, 1962

Participants: Mr. Mitsuro DONOWAKI, Secretary, Legal Section, Treaties Bureau, Ministry of Foreign Affairs

Harrison M. Holland, Second Secretary of Embassy

Place: Ministry of Foreign Affairs, March 7, 1962

Subject: Service of Process by Japanese Consuls in the United States

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In answer to my question of when and under what circumstances Japanese consuls in the United States began to serve process on Japanese and American citizens, Mr. Donowaki replied that because the Foreign Ministry could find no alternative means of serving process on these people, it decided in June of 1958 to authorize Japanese consuls to do so. This decision was taken after an exchange of correspondence between Mr. Arita of the American Affairs Bureau of the Foreign Ministry and Mr. Baldwin of the Embassy dated April 25 and May 2, 1958 /see attachments to second enclosure to Embassy OM to Department of May 7, 1958/ and the receipt by the Foreign Ministry of the Embassy's memorandum dated June 8, 1958 /see first enclosure to Embassy OM to Department of November 17, 1958/. At the time, the Supreme Court Secretariat indicated some misgivings about the practice and implied that it might not be entirely legal but the Foreign Ministry insisted that this was the only practical way to serve legal documents in the US.

Donowaki continued that inasmuch as the decision was based solely on the documents referred to above and because the Supreme Court Secretariat had expressed some doubts about the legality of the practice, it was thought desirable to have the procedure confirmed in the Consular Convention.

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